

**BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
WASHINGTON REGIONAL DISTRICT IN
MONTGOMERY COUNTY, MARYLAND
Office of Zoning and Administrative Hearings
100 Maryland Avenue, Room 200
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF:
BA OLD GEORGETOWN ROAD, LLC AND
CHRIST EVANGELICAL LUTHERAN CHURCH
OF BETHESDA-CHEVY CHASE,
Applicants

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Before: Françoise M. Carrier, Hearing Examiner

Zoning Application No. G-864

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. SUMMARY

Site Size and Location:	The subject site consists of 1.87 acres of land at the corner of Old Georgetown Road and Glenbrook Road in Bethesda, just a few feet from the boundary of the Bethesda Central Business District. The site is made up of several parcels of land under common ownership.
Rezoning Request:	Applicants seek to rezone the subject site from the R-60 Zone (single-family residential) to the PD-44 Zone (Planned Development).
Current Use:	The subject property is the site of Christ Evangelical Lutheran Church of Bethesda-Chevy Chase (the “church”), containing the church building, an adjoining three-story community building that houses various spaces used by the church and other community groups for activities including social services and recreation, and three single-family detached homes that are used for a child day care center and other purposes. The site has a surface parking lot accessible from Old Georgetown Road, Rugby Avenue and Glenbrook Road.
Proposed Use:	Applicants propose to renovate the existing church building, demolish the single-family structures and construct a five-story community building and an eight-story multi-family residential building with up to 107 dwelling units and a maximum height of 114 feet. Parking is proposed to be located underground.
Road Abandonments:	Applicants have applied to the County for abandonment of portions of Rugby Avenue and Glenbrook Road that lie within the subject property. The County Executive and a public hearing officer have recommended approval of the abandonments. Approval of the abandonments would be necessary to permit the proposed development to go forward.
Recommendations:	<p>The Planning Board and Technical Staff recommend approval, finding that the proposed development would comply with the purposes of the zone, would be consistent with the applicable master plan and would be compatible with existing and proposed uses in the surrounding area. The Planning Board recommendation expressed the view that changes could be made during site plan review to improve compatibility with nearby single-family residences.</p> <p>The Hearing Examiner recommends denial of the application on grounds that the size, bulk and locations of the new construction proposed for this site would be incompatible with single-family homes in the immediate vicinity, and therefore would not substantially comply with the applicable master plan or the purposes of the zone, because neighborhood compatibility is central to both the master plan and the purposes of the zone.</p>
Neighborhood Response:	The application enjoys substantial support from church members, as well as from various non-profit groups that provide community

services in the Bethesda area, some of them operating out of the church's existing community building. Supporters argue that the rezoning should be approved to allow the church to continue its mission at its current location, including providing important social services to needy Bethesda-area residents.

The application is opposed by immediate neighbors, including the Committee of Concerned Residents of Glenbrook Road and Rugby Avenue, made up of several residents of blocks adjacent to the subject site. This committee (and its chair as an individual) were represented by counsel, who brought three expert witnesses as well as community witnesses. Several other local residents testified and wrote letters in opposition, including representatives of the Battery Park Citizens Association, although the citizens association did not take a formal position.

II. STATEMENT OF THE CASE

Application No. G-864, filed on November 29, 2006 by Applicants BA Old Georgetown Road, LLC and Christ Evangelical Lutheran Church of Bethesda-Chevy Chase (together, the "Applicants"), requests reclassification from the R-60 Zone (single-family residential) to the PD-44 Zone (Planned Development, 44 dwelling units per acre) of 1.87 acres of land located at 8011 and 8015 Old Georgetown Road, Bethesda, Maryland, in the 7th election district. The subject site is identified on Tax Map HN23 as Parcels P860, P869, P816, P859; Lots 1, 2, 3, 4 and 11, Block B of Robertson's Addition to Bethesda; and Lot 9, Block C of Robertson's Addition to Bethesda.

The application was initially reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission ("MNCPPC") who, in a report dated August 24, 2007, recommended *approval*. See Ex. 98. Technical Staff submitted additional comments via email, in response to questions from the Hearing Examiner, on July 9 and September 12, 2008. See Exs. 321 and 357. The Montgomery County Planning Board ("Planning Board") considered the application on September 6, 2007 and voted unanimously to recommend *approval*, finding that "the application is consistent with the purpose clause and all applicable standards for the PD-44 Zone; the development plan is compatible with existing and proposed uses in the surrounding area; and the PD-44 Zone conforms to the recommendations of the 2006 Woodmont Triangle Amendment to the Bethesda CBD Sector Plan." Ex. 102. The recommendation letter includes the following qualifying language (Ex. 102 at 1-2):

The Board expressed the position that the relationship of the proposed residential building to the adjacent single-family detached residences needs to be carefully examined at site plan. Specifically, Chairman Hanson believes that improved design of the residential building can mitigate potential conflicts with existing single-family residences. It was the position of the Board that the compatibility issue can be more effectively addressed at site plan than at the rezoning stage.

Therefore, the Chairman recommends that the District Council view the presentations, including the development plan, as illustrative rather than binding so that the potential compatibility issues can be thoroughly examined and resolved at site plan.

This qualifying language and recommendation from the Planning Board Chairman are problematic. The Planning Board undoubtedly has the resources and expertise to address compatibility issues during a site plan review. It is the District Council's responsibility, however, to make a compatibility finding in deciding an application for rezoning. Neither case law nor the Zoning Ordinance offers the Council an option to delegate that responsibility to the Planning Board. This is particularly the case in the PD Zone, which requires a development plan. Pursuant to Code § 59-D-1.1, development in the PD Zone is permitted only "in accordance with a plan approved by the district council at the time the land is classified in" the zone. A site plan "that conforms to all non-illustrative elements of the approved development plan" must later be approved by the Planning Board. Code § 59-D-1.2. To approve a development plan, the Council must make five findings, set out in Section 59-D-1.61, including substantial compliance with the master plan; compliance with the purposes, standards and regulations of the zone; compatibility with adjacent development; compliance with environmental standards; and "[t]hat the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient." The zones that require a development plan, including the PD Zone, do not have the specific development standards found in most zones, such as building height and setback requirements. In the absence of such standards, the development plan provides the basis for the District Council to make the necessary findings and to assess compatibility, one of its most fundamental obligations in a rezoning case. As a result, the Hearing Examiner concludes that the District Council does not have the discretion to consider the Development Plan submitted in this case to be entirely illustrative.

The qualifying language quoted above also is problematic because its statement that “improved design of the residential building can mitigate potential conflicts with existing single-family residences” suggests the Chair believed that the development plan presented to the Planning Board would not be fully compatible with existing single-family residences, but that changes could be made at site plan to achieve a compatible building design. This detracts from the substantial weight normally given to Planning Board recommendations.

The Hearing Examiner convened a public hearing after proper notice on June 6, 2008, at which evidence and testimony were presented in support of and in opposition to the proposed rezoning. The hearing continued on June 6, June 24 and September 9, 2008. The record was held open until October 6, 2008 for post-hearing submissions by the parties and was reopened briefly to accept a correction to the site survey. The record closed on October 30, 2008.

III. FINDINGS OF FACT

For the convenience of the reader, the findings of fact are grouped by subject matter. Any conflicts in the evidence are resolved under the preponderance of the evidence test.

A. Subject Property

The subject property consists of approximately 1.87 acres of land located at the northwest corner of Old Georgetown Road and Glenbrook Road in Bethesda, just north of the Bethesda Central Business District (“CBD”). The site is irregularly shaped, with approximately 320 feet of frontage along Old Georgetown Road on the south, 180 feet of frontage along Glenbrook Road on the east, and a depth of approximately 310 feet along its western property line. The center of the site’s Old Georgetown Road frontage is occupied by the church building, a traditional, brick church with a tall spire. A three-story, brick-and-frame building located adjacent to the church to the east and connected to the church by a breezeway is used as a community center. Immediately west of the church is a two-story residential building that formerly housed the Bethesda Fellowship House, an elderly day care center serving people with Alzheimer’s disease, and is currently a rental dwelling.

The rear part of the site holds a surface parking lot with 62 spaces. The subject site also contains two single-family homes, one located behind the community center facing Glenbrook Road, and the other behind the parking lot facing Rugby Avenue. The Rugby Avenue house is used for a child day care program and the Glenbrook Road house for emergency shelter and social services.

The subject property contains a number of trees, shrubs and grassy areas near the buildings and along Old Georgetown Road. There are no wetlands, floodplains, forests, streams, rare or endangered species or critical habitats on the property. There are no historic features on or adjacent to the property. The photographs below show three views of the site from Old Georgetown Road.

Church and Part of Community Center Seen from Across Old Georgetown Road, Ex. 337



Subject Site Seen from Old Georgetown Road Heading West, Away from CBD. Ex. 28(a)



Subject Site Seen from Old Georgetown Road Heading East Towards CBD. Ex. 30(a)



The general shape and location of the subject property are shown on the map that follows, excerpted from Ex. 360(b).

Vicinity Map, excerpted from Ex. 360(b)



B. Surrounding Area

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in a floating zone case than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account areas that would be most directly affected by the proposed development.

In the present case, Technical Staff described the surrounding area as bounded by Battery Lane to the north and west, Wilson Lane to the south and Woodmont Avenue to the east. See Ex. 98 at 2. Applicants’ land planner, Phil Perrine, defined a somewhat smaller surrounding area, bounded by

Battery Lane to the north and west, Del Ray Avenue to the south, and the uses confronting the property along Old Georgetown Road, between Del Ray Avenue and Battery Lane, to the east. Mr. Perrine testified that he also considers Staff's surrounding area description to be acceptable. The Hearing Examiner finds Mr. Perrine's surrounding area too restrictive, given the likelihood that the proposed eight-story building would be visible from across Old Georgetown Road for more than just the first row of homes. Accordingly, the Hearing Examiner accepts Technical Staff's surrounding area description, including within it structures on the west side of Battery Lane between Keystone Avenue and Glenbrook Road.

The surrounding area contains a mixture of residential, office and institutional uses classified under the R-60 (single-family), R-10 (multi-family, high density), CBD (central business district) and C-T (commercial, transitional) Zones. To the west, the subject property abuts the Bethesda-Chevy Chase Rescue Squad, which, like the subject site, is classified under the R-60 Zone. The rescue squad property contains an institutional building estimated at 25 to 30 feet in height, with the rest of the site occupied by surface parking. Farther west are single-family homes in the R-60 Zone and a smattering of multi-family and commercial buildings in the R-10 Zone. These buildings range from three stories in height to a 12-story multi-family building along Battery Lane.

To the north and northeast, the subject property abuts and confronts a small residential enclave in the R-60 Zone, consisting of approximately 20 single-family detached homes on Rugby Avenue and Glenbrook Road. The two roads meet at a joint intersection with Norfolk Avenue, forming a roughly triangular residential neighborhood. Farther north is a mixture of commercial and multi-family uses on the north edge of the Bethesda CBD, in the R-10 Zone, with a variety of building heights. Battery Lane Park is located one block northeast of the subject site, stretching from the intersection of Glenbrook and Rugby up to Battery Lane.

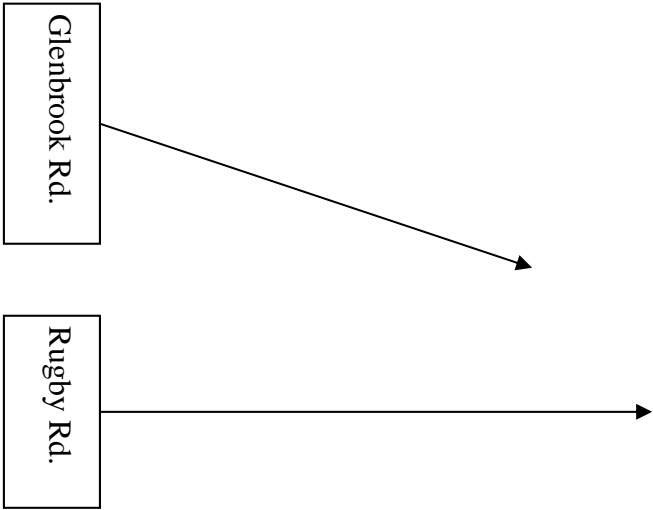
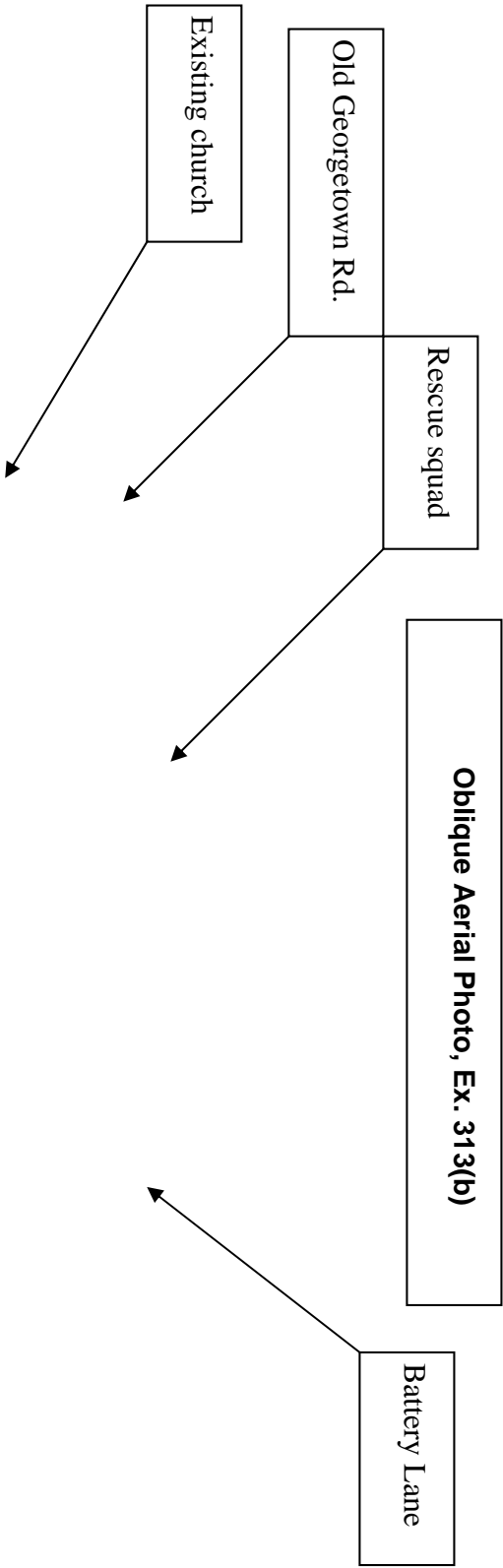
On the block backing onto Glenbrook Road to the east, just inside the CBD boundary at the corner of Auburn Avenue and Norfolk Avenue, a nine-story multi-family building with retail on the ground floor has been approved for construction. Directly to the east, the front part of the subject

property confronts an eleven-story office building at the corner of Old Georgetown Road and Glenbrook Road in the CBD-1 Zone. That building is a legal nonconforming use; it does not comply with current zoning requirements, but is permitted as a “grandfathered” use. Farther east, on the same side of Old Georgetown Road, is the bulk of the Bethesda CBD, which contains buildings of varying heights, types and uses in three CBD Zones.

Across Old Georgetown Road, the subject site confronts single-family detached homes in the R-60 Zone. Diagonally across Old Georgetown Road to the east is an office building in the C-T Zone that has three stories facing Old Georgetown and four to the rear. Farther southeast on Old Georgetown are one- and two-story buildings with commercial services and retail. To the south and west is the Battery Park single-family neighborhood in the R-60 and R-90 Zones, stretching away from the CBD for many blocks.

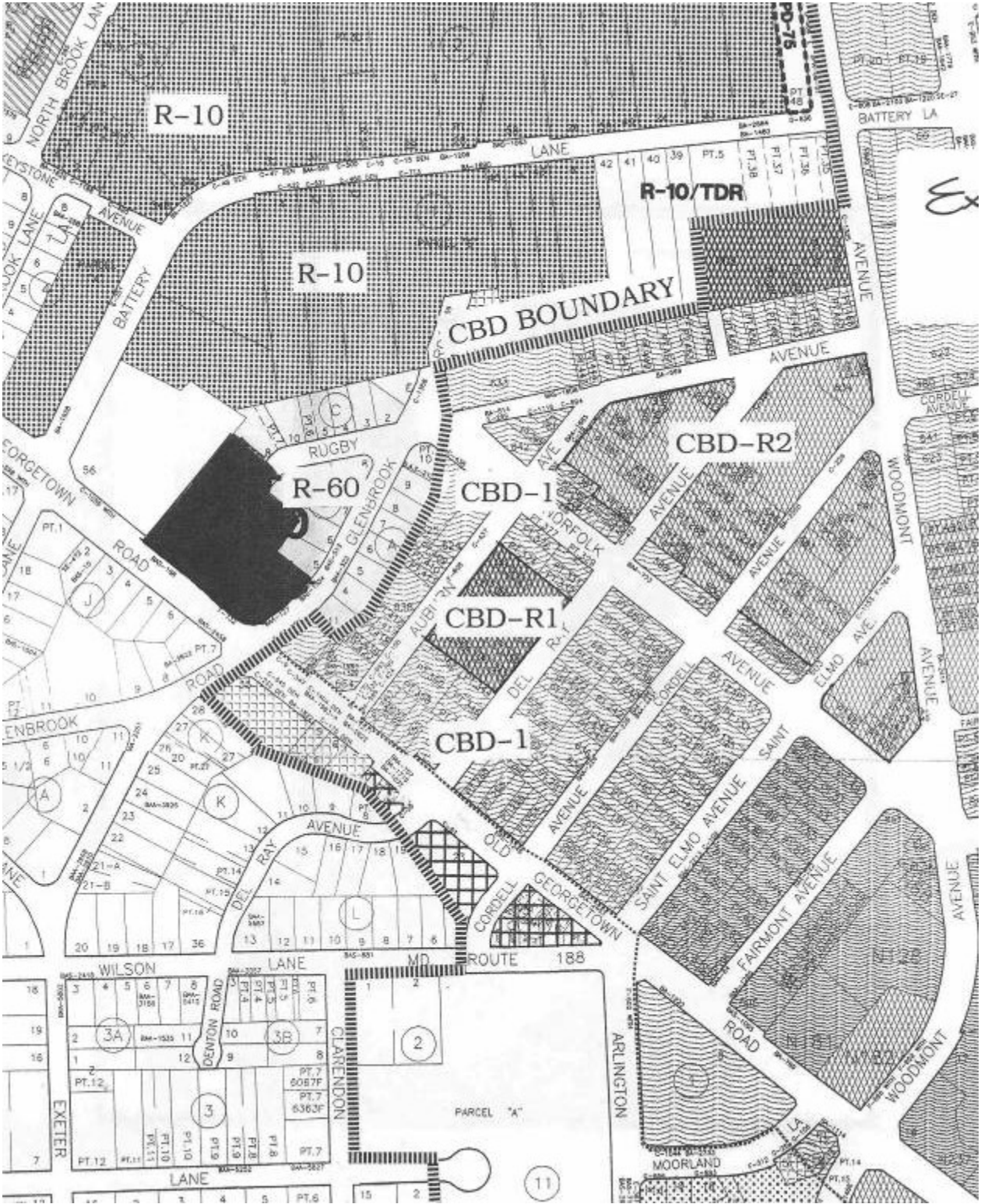
The relationship of the subject site to nearby land uses may be seen on the aerial photograph on the next page.

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The subject site's relationship to the CBD boundary and nearby zoning categories may be seen on the map below. Photographs of the Rugby Avenue/Glenbrook Road neighborhood follow.

Zoning Map, Excerpted from Ex. 269



Rugby Road Looking Northeast, Away from Subject Site. Ex. 333.



Glenbrook Road Looking Northeast. First House in Photograph is Wolfe Residence, Third House from Subject Site on Glenbrook. Ex. 332.



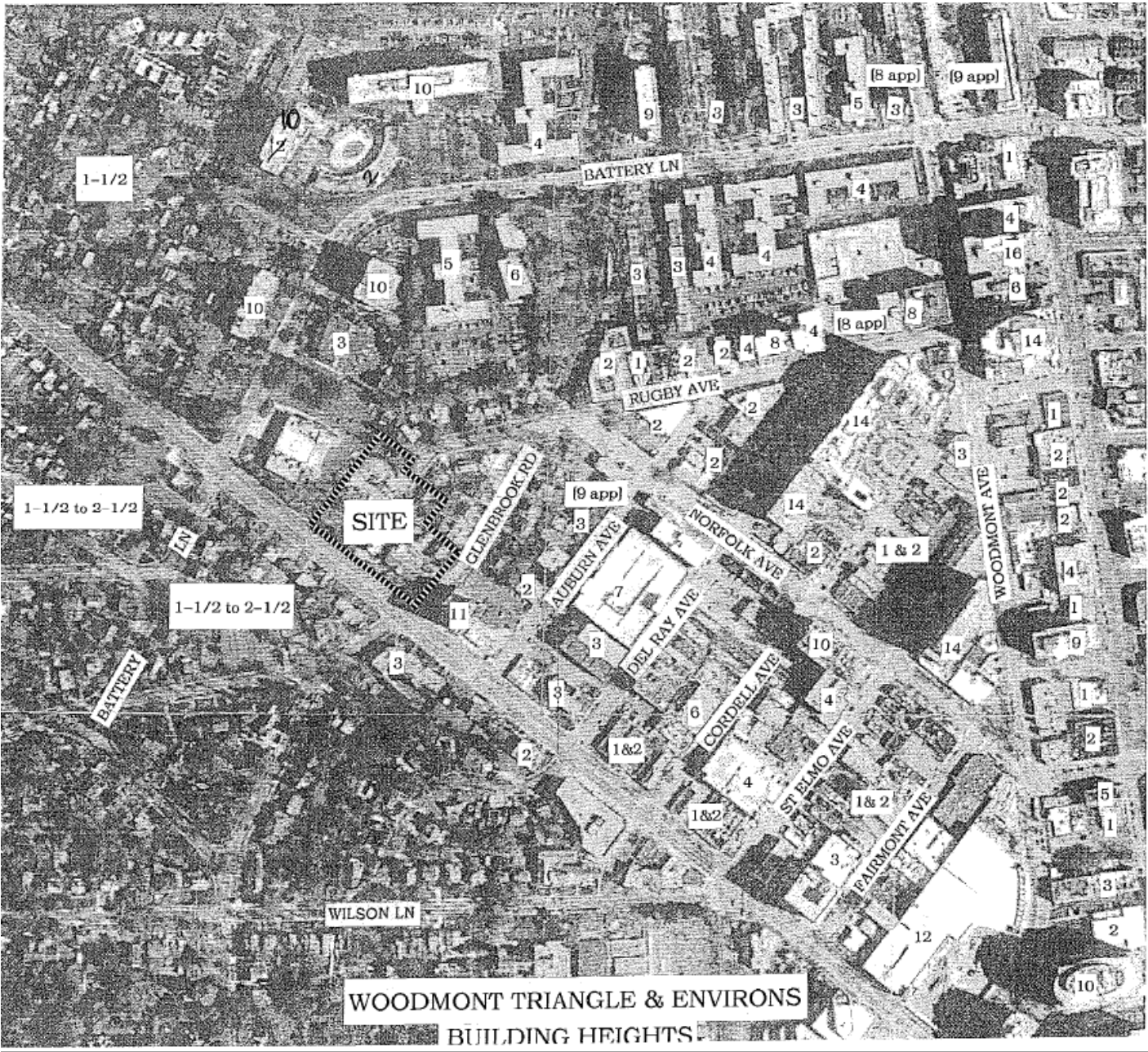
Rear of Home Abutting Subject Site on Glenbrook Road (Estreicher Residence), with Small House on Subject Site to Right and 11-Story Building on Corner of Old Georgetown Road and Glenbrook Avenue in Background. Ex. 345(b)



View 2

Applicants' land planner annotated the aerial photograph below to show the heights of non-residential buildings near the subject site.

Aerial Photograph with Building Stories, Ex. 313(a)



C. Zoning and Land Use History

The subject property was classified under the R-60 Zone in a 1954 comprehensive rezoning. R-60 zoning was confirmed by Sectional Map Amendment in 1977 (SMA G-20) and 1994 (SMA G-711). See Staff Report at 4; county land records.

D. Proposed Development

The church's pastor of 25 years, Marvin Tollefson, testified that in about 2000, the church started taking a serious look at its space, in light of both increasing requests for the church to provide services to various parts of the community and the age of the facilities. See Tr. June 24 at 48. They identified three options: sell the property and carry out their mission at another location, renovate the existing buildings and try to make that work, or rebuild entirely to meet the needs of the church and the community. The church's decision to take the third option led to a request for proposals from developers, and the church ultimately chose Bozzuto Homes, Inc. ("Bozzuto") as its development partner (Applicant BA Old Georgetown Road LLC is a Bozzuto affiliate).

The Applicants propose to renovate the chapel, replace the adjoining community center with a new, larger community center building in the same location, and add to the site an eight-story multi-family building with up to 107 dwelling units (including 15 percent Moderately Priced Dwelling Units ("MPDUs"), a total of 17 units) and a maximum height of 114 feet. The roof of the proposed multi-family building is proposed to be partly a green roof with environmental benefits, and partly a recreational area with a lap pool, a cook-out pit and open areas for gatherings. The community center would have approximately 52,000 square feet, five stories and a maximum height of 76 feet, with a two-story breezeway connecting it to the main church building. The church plans to house an expanded child day care center on the first floor, with church offices and classrooms on the second floor, offices for non-profit organizations on the third floor, and a gymnasium with associated spectator mezzanine occupying the fourth and fifth floors. See Ex. 306.

The appearance of the proposed buildings on site is simulated in the photographs that follow.

**Photo Simulation of Proposed Development Looking West on Old Georgetown Road,
Away from CBD. Ex. 29(a)**



**Photo Simulation of Proposed Development Looking East on Old Georgetown Road,
Towards CBD. Ex. 31(a)**



There was much discussion about the gymnasium during the hearing, because its design is intended to meet the specifications for a junior varsity basketball court. These specifications require a building of much larger proportions than the current community center or the church. In addition to raising compatibility issues with regard to adjacent and nearby homes, the building height and depth required to accommodate the gymnasium would make it impossible to satisfy a building height recommendation in the applicable master plan that Technical Staff applies to this site. Applicants' architect mentioned that the basketball court would be the minimum size necessary for the Fellowship of Christian Athletes, a community league, and it includes a mezzanine with enough space to set up seats for 150 to 200 spectators. See Tr. June 6 at 71, 195. Pastor Tollefson testified that there is no public gymnasium in this part of Bethesda for young people to play basketball or work out, and there is also a need for a recreational facility for the elderly, who need air conditioning in the summer and heat in the winter. See Tr. June 24 at 53. One church member wrote that the basketball court would allow the church to add a youth outreach program to its ministry, including indoor tournaments. See Ex. 92.

The church indicated that the new community center would allow for more organized use of space for the church's many outreach programs, including worship space for other churches who do not have their own building, a multipurpose room for gatherings and activities, an international/multi-cultural center addressing the needs of new immigrants, a performing arts learning center for adults and youth, and a senior adult resource center providing quality day care for senior citizens. See Ex. 35. Pastor Tollefson stated that the new construction would also allow the church to expand some of its services, such as almost doubling the size of the child care facility, and to add new services like after-school care that are needed in the community. See *id.* The church hopes that this redevelopment will allow it to stay in Bethesda and expand the services it offers to the community, connecting increasing numbers of people with the church's resources. See Exs. 35, 293. Approximately 140 letters were received in support of the present application from church members, members of the local non-profit community, and others, almost all of which emphasized that the proposed development would benefit the community by allowing the church to continue providing high-

quality social services and cultural and recreational opportunities to the Bethesda community, rather than moving to another location. The letters, which are summarized in some detail in Part III.I. below, emphasize the church's valuable role in the Bethesda community, where it has provided services to needy community members for more than 70 years.

Representatives of the church and Bozzuto indicated that the two entities plan to enter into a shared use agreement regarding the pool, other rooftop recreation areas, and the day care center courtyard/playground. A Bozzuto representative suggested that facilities connected to the residential building might be available to the church at specific times or for specific events, and the Applicants' architect suggested that the day care center playground might be available to building residents during off hours.

E. Development Plan

Pursuant to Code § 59-D-1.11, development under the PD Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the PD Zone. This development plan must contain several elements, including a land use plan showing site access, proposed buildings and structures, a preliminary classification of dwelling units by type and number of bedrooms, parking areas, land to be dedicated to public use, and land intended for common or quasi-public use but not intended to be in public ownership. Code §59-D-1.3. Once approved by the District Council, the development plan is binding on the Applicant except where particular elements are identified as illustrative or conceptual. The project is subject to site plan review by the Planning Board, and minor changes to the plan may be made at that time. The principal specifications on the development plan – those that the District Council considers in evaluating compatibility and compliance with the zone, for example – may not be changed without further application to the Council to amend the development plan.

The principal component of the development plan in this case is a document entitled Development Plan, Exhibit 360(b), which is reproduced on pages 20 to 25 below. Additional elements

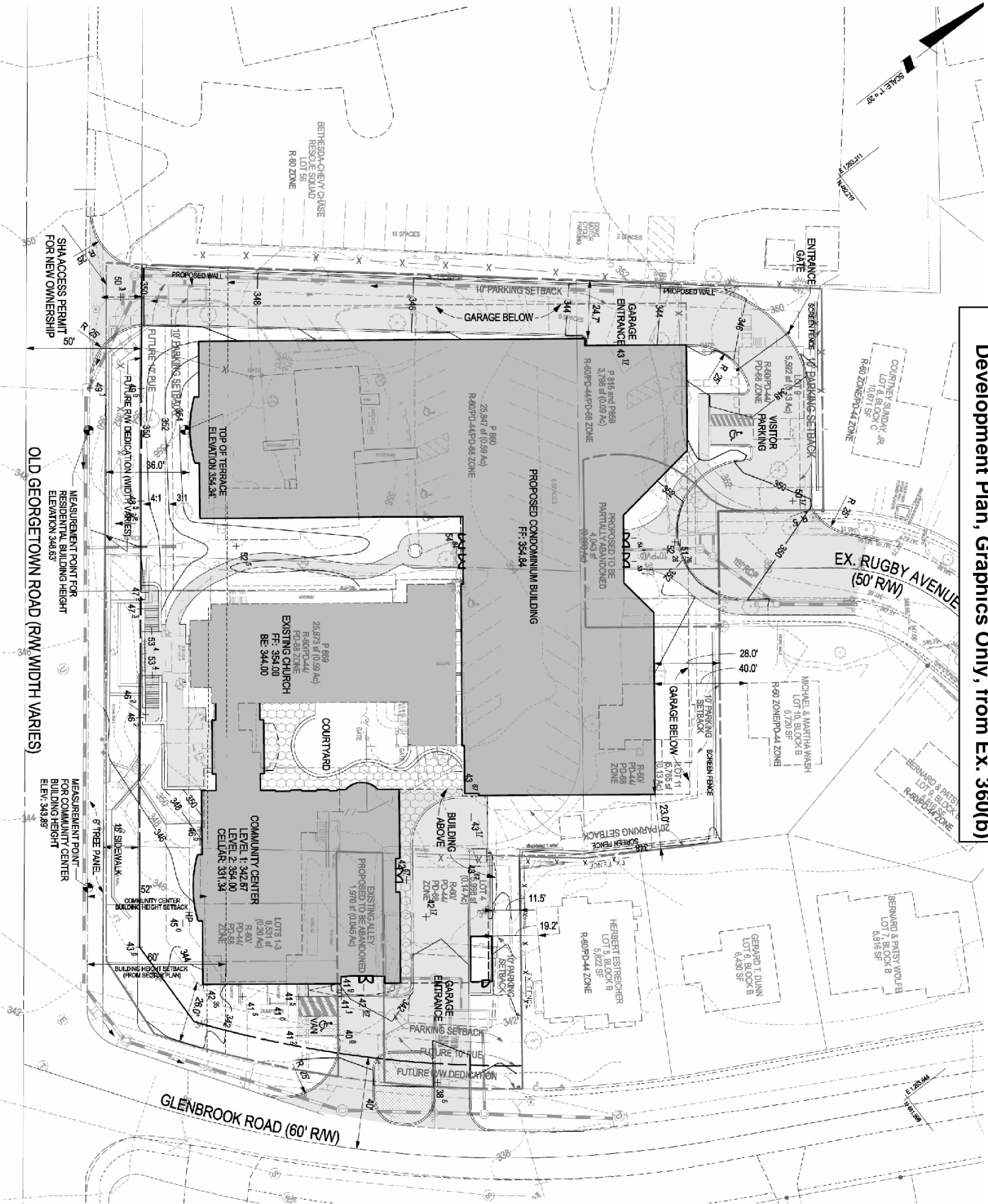
of the Development Plan include aerial photographs (Exs. 15, 270 and 313(b)), a zoning map/surrounding area map indicating the relationship between the subject site and neighboring zoning and land uses (Ex. 269), and a Natural Resources Inventory/Forest Stand Delineation ("NRI/FSD," Ex 13).

Exhibit 360(b) satisfies the requirements of Code § 59-D-1.3 by showing access points, the approximate locations of the proposed buildings, preliminary classification of dwellings by number of bedrooms, parking areas, intended right-of-way dedications for Old Georgetown Road and Glenbrook Road, and areas intended for common use but not public ownership (the ground level landscaped areas, setback areas and walkways, and the day care center courtyard, which may be used during off times by building residents). The Development Plan is shown on the next page in full, and on succeeding pages in parts, at a larger scale.

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Development Plan, Graphics Only, from Ex. 360(b)



Development Plan Legend, from Ex. 360(b)

LEGEND	
EXISTING LOT LINES	— — — — —
PROPOSED R/W	— — — — —
BOUNDARY LINES	— — — — —
STREET CENTERLINES	— — — — —
PROPOSED EASEMENTS	— — — — —
EXISTING BUILDINGS	[— — — — —]
PROPOSED BUILDINGS	[— — — — —]
EXISTING CONTOURS	— — — — — 300 302
PROPOSED CONTOURS	— — — — — 300 302
PROPOSED STORMDRAIN	— — — — —

As stated in the General Notes below, minor adjustments may be made to the relative locations and configurations of the various components of the plan during site plan review. The intent of note 5 is to allow for minor shifts in the building locations and footprints during the more detailed planning that takes place at preliminary plan and site plan review. Note 6 states that “The Building” will be built in one phase. This is consistent with testimony from Bozzuto representative Clark Wagner that the project would start with building demolition and utility installation, then move to building the parking garage, followed by building the condominium building and church renovations. See Tr. June 24 at 32-33. If the District Council elects to approve the rezoning, the Development Plan submitted to the Hearing Examiner for certification should read “Buildings” rather than “Building,” for the sake of clarity and consistency with the testimony.

Development Plan General Notes, from Ex. 360(b)**GENERAL NOTES****

1. Boundary information shown hereon and topographic Information, shown at 2' intervals on this plan, was obtained from field survey by Loiederman Soltesz Associates, Inc.
2. The site is to be served by public water and sewer systems and is presently classified in water and sewer categories W-1 and S-1, respectively.
3. The site lies within the Rock Creek Watershed. No portion of the site is in a floodplain, stream buffer, or wetlands.
4. Utility Companies:
 - Electric Potomac Electric Power Company
 - Telephone Verizon
 - Gas Washington Gas
 - Cable Television Comcast
 - Water Washington Suburban Sanitary Commission
5. This plan shows the relative location and configuration of the various components of the project and minor adjustments may be made at the Site Plan stage.
6. The Building will be built in one phase.
7. The site plan shall include a phasing and unit distribution plan for the MPDUs.
8. All on-site utilities will be placed underground.

*Textual Binding Elements provided by Linowes & Blocher on August 20, 2007 (Revised on June 4, 2008).

** General Notes are informational only and are not binding elements of the Development Plan.

The Development Plan specifies several textual binding elements, which are items that the Applicant wished to make definite, but were more readily expressed in text than in the graphics. These are shown on the next page.

Textual Binding Elements from Ex. 360(b)**TEXTUAL BINDING ELEMENTS***

1. The density of the site will be limited to that permitted in the PD-44 zone, including the MPDU density bonus.
2. Primary access points will be from Old Georgetown Road and Glenbrook Road.
3. Within the 60' setback, measured from the face of curb of the existing Old Georgetown Road, the new residential building will not exceed 50' in height as measured from the terrace grade.
4. The church and community center will maintain existing setbacks from Old Georgetown Road. Within a 52' setback, measured from the face of curb of the existing Old Georgetown Road, the new community center building will not exceed 50' in height.
5. The maximum heights of the buildings within the development will not exceed 114 feet.
6. The maximum number of dwelling units will be 107, including 15% MPDUs.
7. The green space will meet or exceed 50% of the gross lot area.
8. All green areas (including active/passive recreation rooftop green area) will be accessible to all residents or occupants of the buildings.

The remaining element of the Development Plan, a project data table, is reproduced on the next page. Bedroom counts and parking calculations are preliminary, to be finalized during site plan review.

Project Data Table, from Ex. 360(b)

PROJECT DATA TABLE FOR PD-44

	Zoning Ordinance Development Standards PD-44	Development Plan Proposed for Approval
Net Lot Area (SF):		
Gross Tract Area (SF)		81,404 SF
Less Dedications (Old Georgetown Road and Glenbrook Road)		(6,659 SF)
Plus New Street Abandonment (Rugby Avenue)		4,043 SF
Plus New Street Abandonment (20' Public Alley)		1,970 SF
Net Lot Area (SF) =		80,758 SF
Floor Area Ratio (FAR) =	N/A	2.99
Gross Floor Area (GFA):		
Condominium Building		188,884 sf
Church and Community Center		54,514 sf
Total Gross Floor Area		243,398 sf
Green Space Requirement (Based upon the Gross Tract Area plus abandonment areas (87,417sf).)	50% (43,708.5 sf)	49,871 sf (57%)*
Maximum Density Calculation:		
Maximum Base Density per Zone	44 du/ac	44 du/ac or 107 units**
Number of Dwelling Units (DU):		
Market Rate DU		90
Moderately Priced (MPDU) (15%)		17
Total Number of Dwelling Units		107
Maximum Building Height (FT):		114'
Number of Floors:	Not Specified	8
Minimum Building Setbacks (FT):		
Front South (Old Georgetown Road)		36.0'
Front East Side (Glenbrook Road)		26.0'
West Side		24.7'
Rear North		28.0'
Parking:		
Residential Uses		
One Bedroom - MPDU's - 17 units	@ 1.00 Spaces/Unit =17	
One Bedroom & 1 Br w/ Den Units -- 21 units	@1.25 Spaces/Unit=27	
Two Bedroom & 2 Br w/ Den Units -- 59 units	@1.50 Spaces/Unit=89	
Three Bedroom Units -- 10 units	@ 2.00 Spaces/Unit=20	194 garage plus 2 surface
Total Residential Spaces (including 6 HC accessible spaces)	153	196***
Non-Residential Uses		
Church/Community Center	62	61 garage plus 1 surface
Total Non-Residential Parking Spaces (including 4 HC accessible spaces)	62	62***
Total Parking Spaces	215	258

* Including the green areas on the roof, which comprise 13,545 sf of the proposed green space. 36,326 sf of the proposed green space is on the ground plane. (As provided by MTFA, Inc on August 21, 2008). Land area devoted to green area is approximate and subject to change based on final engineering and further revision based on subsequent subdivision and site plan proceedings provided a minimum of 50% of gross tract area is green area.

** The maximum density is based up 2.006 acres which includes the proposed abandonments, which are expected to be complete at time of final rezoning. (2.006 ac x 44 du/ac = 88 du (Base Density + 19 (22% Bonus Density) = 107 (90 Market Rate and 17, or 15%, MPDU's)

*** Total includes 5 residential and 3 non-residential HC accessible spaces in garage and 1 residential and 1 non-residential HC accessible surface spaces. Preliminary classification of number of bedrooms and number of parking spaces are subject to adjustment at the Site Plan Stage.

F. Master Plan

1. Relevant Sector Plan Provisions

The subject property lies within the Woodmont Triangle District identified in the *1994 Bethesda CBD Sector Plan* (the “1994 Plan”) and is also within the area covered by the *2006 Woodmont Triangle Amendment to the Sector Plan for the Bethesda CBD* (the “Sector Plan”). The purpose of the Sector Plan was “to reconsider how redevelopment could both provide more opportunities for housing close to the Metro station and retain the qualities and ambience of the small-scale retail that distinguishes the study area from other parts of the Bethesda CBD.” Sector Plan at 1. The Sector Plan explains that the 1994 Plan established four goals for the Woodmont Triangle District (Sector Plan at 2):

- Preserve the predominantly low-density and low-scale character of the district.
- Provide additional housing particularly in the north end of the district.
- Support a diverse specialty retail and restaurant environment to serve the community, including sidewalk cafes and dispersed parking.
- Improve the pedestrian environment with up-graded streetscape including street trees and green open spaces.

The 1994 Plan recommended CBD Zones to further its goals, and promoted a design concept with the greatest building heights closest to the Metro and a step down in heights moving away from the CBD core. See Sector Plan at 2. The 1994 Plan recommended maximum building heights below the limits of the zone to address scale, shading and compatibility with neighborhood character. The Sector Plan states that although portions of the Bethesda CBD developed per the 1994 Plan, the Woodmont Triangle District did not, because the building height and density limits inhibited redevelopment. Thus, reconsideration of objectives in the 1994 Plan was warranted.

The study area for the Sector Plan included the entire Woodmont Triangle District from the 1994 Plan, plus the entire Battery Lane District and parts of two other districts. The Sector Plan proposed a vision for the study area of a “vibrant, urban, mixed-use neighborhood that emphasizes

residential, small-scale retail, the arts and public amenities.” Sector Plan at 5. Its goals include housing to serve a variety of income levels, small-scale retail, enhanced opportunities for visual and performing arts, and improving the safety and character of existing streets. The Sector Plan reduced the amount of future commercial development in favor of residential development, allowed increased residential floor area ratio (“FAR”) to encourage housing, and removed the 1994 Plan height limits to encourage redevelopment. It also retained the recommendation that building heights should step down moving away from the CBD core and along Norfolk Avenue to preserve access to sunlight, recommended limited zoning changes to encourage housing, and recommended PD zoning at a density of 44 units per acre for the properties along Glenbrook Road and Rugby Avenue currently zoned R-60, including the subject site.

The Sector Plan supported heights stepping down from the Metro station area to the edges of the CBD, while at the same time encouraging incentives for increased building height to promote housing for all income levels. See Sector Plan at 11. It included the following specific height recommendation, which has been much discussed in this case (Sector Plan at 11):

Limit the height along Old Georgetown Road north of St. Elmo Avenue to 50 feet, extending 60 feet back from Old Georgetown Road to maintain compatibility with existing development.

The Sector Plan offered a proposed building heights map that adds to the confusion surrounding building height in this case, because part of the subject site is not within any of the recommended height districts. See Sector Plan at 12. Technical Staff applied the recommendation above for a limit of 50 feet extending 60 feet back from Old Georgetown Road, but in fact, the subject site is outside the area that is graphically shown with this recommendation on the building height map. This is discussed further below.

The Sector Plan proposed urban design guidelines that recommended designing new buildings so that public streets and spaces retain adequate sunlight, providing sufficient building setbacks to adequately accommodate pedestrians and streetscape improvements, and reviewing new projects for compatibility. See *id.* at 14.

The Sector Plan divided the study area into blocks and provided specific recommendations for each one, both in text and in a table listing recommended zoning and building heights. The subject site was part of Block 19 – the only block for which the plan did *not* include a building height recommendation. See *id.* at 22-23. The full recommendation for Block 19, which was comprised of the subject site and the adjacent residential enclave, follows:

Properties along Rugby Avenue, Glenbrook Road and Old Georgetown Road at the western corner of the Study Area are currently zoned R-60. This Plan recommends PD-44 zoning provided that issues of compatibility with existing single-family homes can be addressed. This would allow near-term redevelopment of an existing church property and possible long-term redevelopment of the single-family detached homes, some of which have been recently renovated. At the time of rezoning, any application should be reviewed to determine compatibility with existing single-family homes, both north and south of Old Georgetown Road. In addition, the rezoning should not be allowed to result in multi-family development surrounding or isolating a limited number of single-family homes.

Sector Plan at 23.

2. Technical Staff's Analysis

Technical Staff noted that the Sector Plan recommended the PD-44 Zone for the subject site, provided that compatibility with existing single-family homes can be addressed. Staff described the intent of this recommendation as “to allow redevelopment of the church property, and possible longer-term redevelopment of the homes along Rugby Avenue.” Staff Report at 5. Technical Staff recommended approval of the rezoning, finding that it would be consistent with the Sector Plan and compatible with its surroundings. See *id.* Staff stated that the proposed residential building would be stepped back with a tiered façade that would not negatively affect homes across Old Georgetown Road

Staff noted that the proposed building height of 114 feet would conform to the Sector Plan, which lifted the height recommendations from the 1994 Plan and replaced them with a 50-foot height recommendation within 60 feet of Old Georgetown Road. See Staff Report at 11-12. Staff stated that the intent of the recommended 50 foot height limit was “to maintain compatibility with the homes across Old Georgetown Road. Staff believes that the intent of the Sector Plan would be to seek compliance with this requirement since the church property does confront homes, particularly at the

northwestern end of the property.” *Id.* Staff stated that the new landscaping and building setbacks would greatly improve pedestrian access and the pedestrian experience along this segment of Old Georgetown Road. Staff considered the scale of the building compatible with nearby existing structures on Old Georgetown Road and Battery Lane.

Staff noted that the proposed residential building would satisfy the 50-foot height recommendation for the first 60 feet from Old Georgetown Road, measuring building height from the elevation of the existing terrace. The Hearing Examiner notes that measuring building height from the grade of an existing terrace, rather than from the road grade, is consistent with longstanding county policy. See Staff Report at 6, referencing attached letter from the Department of Permitting Services.

Staff acknowledged that the proposed community center building would not satisfy the recommended 50-foot height limit within 60 feet of Old Georgetown Road; the building would be approximately 36 feet tall for the first 52 feet from the road, but would rise to 76 feet in height at the 52-foot mark. Thus, the building would exceed the recommended height for a distance of eight feet. Staff considered this intrusion acceptable, noting that the proposed height would be compatible with adjacent development because the existing office building across Glenbrook Road is over 100 feet tall; the building opposite that office building is a four-story office structure in the C-T Zone (the Hearing Examiner notes that the latter building is four stories to the rear, but has only three stories above ground along Old Georgetown Road); the intrusion of excess height into the restricted area is limited; the new buildings would be designed to relate appropriately to the one another and to the existing chapel, with the new community center building maintaining the same setback as the existing community center; and the use of the building – church classrooms and activities, day care, and community services – serves important community functions. See Staff Report at 6, 12. Staff further concluded that “the community benefits provided by the [community center] outweigh the need for strict compliance with the Sector Plan recommendation. The proposed building includes a multi-purpose room and gymnasium that will provide recreational space, community gathering space, and area for rehearsals and performances, that are lacking in this area of the County. . . .” Staff Report at

17. Staff found the proposed community center to be in substantial compliance with the Sector Plan, and considered this adequate in light of “the significant community benefits this building is intended to provide.” See Staff Report at 17-18.

Applicants have measured the 60-foot setback area from the existing right-of-way for Old Georgetown, which is the current curb line. Counsel for the Opposition argued that the setback area should be measured from the new road right-of-way after the dedication that the Applicants have proposed in this case, which would bring the right-of-way 13 feet closer to the proposed buildings. This interpretation would make the community center intrude into the setback area by 21 feet, rather than 8 feet, and would make the proposed residential building intrude into the setback area by 13 feet. Opposition counsel argued that Technical Staff’s findings were based on a misunderstanding that the 52-foot setback would be measured from the future right-of-way line, rather than from the existing curb line. To support this position, Opposition counsel points to the following language on pages 11 and 12 of the Staff Report, where Staff described findings regarding master plan compliance in the context of the PD Zone purpose clause and specifically used the term “right-of-way”:

The proposed building height . . . for the new residential building conforms to the approved Sector Plan recommendations of the Woodmont Triangle Amendment, which lifted the height restrictions included in the [1994 Plan] and replaced them with a restriction on height of 50 feet for a distance extending 60 feet back from the Old Georgetown Road right-of-way. The applicant has noted in the Development Plan that within the 60-foot setback from the existing Old Georgetown Road right-of-way, the new residential construction will not exceed 50 feet in height.”

In response, Applicants’ counsel pointed out language from page four of the Staff Report, which simply restated the proposed textual binding elements:

“Within the 60-foot setback, measured from the face of curb of the existing Old Georgetown Road, the new residential building will not exceed 50 feet in height as measured from the terrace grade.”

Applicants’ land planner, Phil Perrine, argued that the setback area should be measured from the curb line, which is consistent along Old Georgetown Road and not expected to change, rather than the right-of-way line, which is not a straight line and will change if this rezoning is approved. See *id.* at 6, citing Tr. June 2 at 111-112. Mr. Perrine also opined that for purposes of establishing a building

height standard, the appropriate measurement for a setback is from the curb, because what matters is the relationship of the building to the curb. Applicants' architect concurred in this opinion, while a land planning expert testifying for the Opposition argued that setbacks should always be measured from the legal right-of-way line. Applicants consider the reference to "right-of-way" in the Staff Report to be an inadvertent error. See Ex. 360(a) at 6.

The Hearing Examiner does not consider the language from page four of the Staff Report to be indicative of Staff's reasoning. That section of the report merely restated the textual binding elements proposed by the Applicants. The Hearing Examiner nonetheless agrees with the Applicants on this point, because in the last sentence quoted above from page 12, Staff specifically referred to a 50-foot height limit for the proposed residential building "within the 60-foot setback from the existing Old Georgetown Road right-of-way." This suggests strongly that when Staff referred to the right-of-way in the previous sentence, the intended meaning was the existing right-of-way, which is the same as the current curb line. This would be a logical interpretation of the Sector Plan, because in a highly developed area where the road is unlikely to be widened, it makes sense for the plan to recommend a buffer zone based on the existing road configuration.

Turning to the side and rear setbacks, Staff found the setbacks from Rugby Avenue and Glenbrook Road that were proposed at the time of the Planning Board's review to be acceptable. See Staff Report at 6. At that time, the residential building was proposed to be over 70 feet from the nearest home on the west side of Rugby, and more than 20 feet from the closest home on the east side of Rugby, the Wash residence. See *id.* (The north face of the east wing has since been moved back to increase the building to building distance to 40 feet.) The closest home on Glenbrook Road, the Estreicher residence, would abut the proposed multi-family building to the rear and the proposed community center to the side.¹ On the plans that Staff considered and on the current plans, the proposed community center is shown approximately 20 feet from the side of the Estreicher home, and

¹ The Staff Report refers to the multi-family building abutting the Estreicher home on two sides, but a closer examination of the plans reveals that the building abutting this home to the side would be the community center, not the residential building.

the proposed residential building is slightly more than 40 feet from its rear. Staff considered these setbacks sufficient “in that they meet the zoning requirements and reflect the location of the single family homes in an area clearly intended for eventual redevelopment by the Sector Plan.” Staff Report at 6. The Hearing Examiner finds the reference to “meeting the zoning requirements” puzzling, because the PD Zone has no minimum setbacks that would apply at this location. This leaves the potential for eventual redevelopment as Staff’s only justification for considering these setbacks appropriate.

Staff concluded that the proposed development would not violate the Sector Plan’s admonition against isolating a limited number of single-family homes. Staff interpreted this part of the plan as seeking to avoid piecemeal redevelopment along Rugby Avenue that would leave homes surrounded by taller, multi-family structures. Here, Staff noted, the proposed development is on the edge of the residential area, which is consistent with the Sector Plan’s proposal that higher density should be accomplished on this part of Rugby Avenue via assembly of lots. See Staff Report at 7.

Staff noted from the submitted shadow study that at the times of greatest shadow impact, the existing homes are more impacted by the 11-story office building across Glenbrook Road than they would be by the proposed new buildings. See Staff Report at 6.

In concluding their master plan analysis, Staff noted that the proposed rezoning would add housing to the Woodmont Triangle Area, and allow the church to improve its facilities and expand the services it offers to the wider community. This led to the following conclusion: “The Community-Based Planning staff (the division within MNCPPC responsible for master plan interpretation) believes that the service that the church will provide to the community is a fair trade-off.” Staff Report at 7.

Technical Staff also made more general findings regarding compatibility, which is an important component of the Sector Plan’s specific recommendations for the subject site. Staff found that the proposed residential building would be “a defined entryway to Bethesda from the west” and would “provide a quality urban design transition between the residential neighbors to the northeast and the traffic and noise of Old Georgetown Road. This design transition to the residential neighborhood is

accomplished through a series of urban landscape elements including planter strips, vegetated privacy fences, and stepped topography.” Staff Report at 16. Staff noted that the Applicants propose to construct a seven-foot privacy fence along each boundary with a single-family home, to be landscaped on both sides “to increase the depth of separation between structures and reduce noise.” *Id.* at 17. In addition, Staff observed, the home on the north (west) side of Rugby Avenue is proposed to have both a privacy fence and a retaining wall, to mitigate sound and light from cars. Staff also relied on the fact that the loading dock would be inside the building, not between the building and an adjacent home.

3. Applicants’ Analysis

Applicants’ land planner, Phil Perrine, opined that the proposed development would substantially comply with the Sector Plan. He noted that the purpose of the Sector Plan was to reconsider how redevelopment could both provide more opportunities for housing close to Metro, and retain the qualities and ambience of the small-scale retail that distinguishes the study area from other parts of the Bethesda CBD. See Ex. 33 at 6. He observed that to achieve this, the Sector Plan encouraged the development of additional housing and community amenities and services, and provided greater flexibility with regard to height and density. See *id.* Mr. Perrine explained that the Sector Plan increased the recommended height from 50 feet to 90-143 feet in the region south and east of the Glenbrook Road/Rugby Avenue area, while Old Georgetown Road retained the 50-foot height recommendation for the first 60 feet back from the road. See Tr. June 2 at 50-51.

Mr. Perrine related some master plan history, noting that in the 1970 master plan for the area, the subject property was recommended for residential, multi-family high-rise zoning, with 43 units to the acre. This recommendation was not implemented, however, and the zoning remained R-60. See *id.* at 54. In a 1976 amendment, the subject property was again recommended for multi-family zoning, but this also was not implemented. Mr. Perrine reported that the 1994 Plan departed from the previous two, recommending continued R-60 zoning for two reasons: a higher density on the church site would be difficult due to the cost of structured parking, plus R-60 zoning would preserve some affordable single-family homes. In fact, he noted, many homes near the subject property have been upgraded,

and the neighborhood is not affordable. See *id.* at 58-60. Mr. Perrine described the current Sector Plan recommendation for the PD-44 Zone as similar to earlier multi-family recommendations.

Mr. Perrine opined that the proposed development would conform to the present Sector Plan recommendations. In his view, the development would not isolate single-family homes, because it is on the edge of the single-family neighborhood. See *id.* at 51.

Mr. Perrine further opined that the proposed project will be compatible with the surrounding area, focusing on the urban setting. He noted that the surrounding area has small pockets of R-60 zoning surrounded by multi-family housing, high-rise and mid-rise zoning, with zoning that permits dwellings at 43 to 80 units per acre, and building height limits from 60 to 150 feet. See Tr. June 2 at 63. He described a wide variety of building sizes in the surrounding area, from two stories to eleven, but noted that the trend is towards taller buildings, in keeping with the Sector Plan, such as a nine-story building with retail on the first floor and residential above that has been approved on Auburn Street, backing up to the single-family homes on the east side of Glenbrook Road. Mr. Perrine noted that there are other high rises adjacent to single-family homes, cited a building known as the Edgemoor Condominium building, which was the subject of a re-zoning to the TS-R Zone in 1998. He noted that the 100-foot tall building in that case, located on Montgomery Lane at Woodmont Avenue, is only 50 feet from a single-family home. Mr. Perrine acknowledged that the Edgemoor Condominium building is also adjacent to another high-rise, and is in an area that the 1994 Plan recommended for high-density development. See Tr. June 2 at 150-51.

Mr. Perrine defined the differences between rural, suburban and city living, emphasizing compatibility for each setting: in a rural setting compatibility might rely on distance, in a suburban setting it might rely on a row of pine trees, and in an urban setting, it would rely more on a screen wall, a fence, design of the facility and putting some activities indoors. See Tr. June 2 at 145-47. Mr. Perrine described the urban setting around the subject property as the main amenity for nearby homes, more so than their backyards. He voiced agreement with the Chair of the Planning Board that in an urban setting like this one, with dozens of shops and restaurants within walking distance,

compatibility relies on the quality of design versus distance, emphasizing more attractive landscaping and screening walls instead of setbacks, together with below grade parking to mitigate visual, noise and activity impacts. See Tr. June 2 at 70-71. The Hearing Examiner notes that it is difficult to evaluate these elements of compatibility at the zoning stage, when the plans have not yet reached that level of detail. The Hearing Examiner raised this issue with Mr. Perrine during the hearing, asking how the Council should evaluate compatibility, given that the design elements are illustrative at the zoning stage. Mr. Perrine suggested that the Council should rely on the two-stage approval process established in the Zoning Ordinance, which requires the Planning Board to ensure compatibility at site plan. See *id.* at 71-73. The Hearing Examiner cannot recommend this approach to the District Council under the Zoning Ordinance as currently written. As noted in Part II above, the Planning Board undoubtedly has the resources and expertise to address compatibility issues during a site plan review. It is the District Council's responsibility, however, to make a compatibility finding in deciding an application for rezoning. Neither case law nor the Zoning Ordinance offers the Council an option to delegate that responsibility to the Planning Board.

Mr. Perrine also noted that the proposed development would have the benefits of retaining a church in a CBD and allowing it to continue providing community services and recreation programs to the Bethesda community, as well as providing 17 affordable housing units.

Applicants' counsel also addressed Sector Plan issues, in particular describing the Applicants' participation in the development of the Sector Plan. See Ex. 360(a) at 2. Applicants' counsel stated that during the Council's deliberations on the Sector Plan, the Applicants presented conceptual plans similar to those now proposed. See *id.* Applicants noted that the general recommendations in the Sector Plan state an intention "to capitalize on the development and revitalization potential of the study area as a transit-oriented urban neighborhood." Sector Plan at 10. They also point to language in the plan that supports increased building heights to encourage new opportunities for housing for all income levels. See Ex. 360(a) at 2-3, Sector Plan at 11.

Applicants' counsel represent that during the Sector Plan process, a recommended height limit was suggested for the subject site, but was rejected by the Council. See Ex. 360(a) at 3. Counsel did not submit any documentation to support this allegation, but referred to the absence of a height limit for Block 19 as support for their argument. Applicants' counsel assert that a 50-to-100-foot height limit recommended in the text for Block 20 conflicts with the building height limit map in the Sector Plan, which shows a small portion of Block 20 in an area with a 35-foot height limit. See *id.* at 4. Counsel consider this a remnant that was left over from the building height limit map in the 1994 Plan, perhaps implying that the building height limit map contains errors and therefore should not carry significant weight. Applicants' counsel notes that a nine-story building has been approved in Block 20. Based on the Hearing Examiner's review of the map demarcating the various "Blocks" in the Woodmont Triangle Study Area, there is some ambiguity about which block edge streets fall into, an ambiguity that might well be resolved by looking for an interpretation that would be consistent with the building height limit map, rather than one that suggests the building height map is incorrect. See Sector Plan at 22, 12.

4. Opposition Analysis

Both the Concerned Residents of Glenbrook Road ("Concerned Residents") and the Montgomery County Civic Federation ("Civic Federation") argue that the height limit Technical Staff applied to this application is not relevant. See Exs. 359(a), 348. They point out that the Sector Plan recommended a 35-foot height limit for the rear portion of the subject site and for the adjacent residential enclave. Opposition counsel David Brown notes that the proposed 114-foot multi-family building – which would sit partly on the rear portion of the site -- would be three times as high as the recommended height limit. Moreover, Mr. Brown points out that on close examination, the "proposed building height" map in the Sector Plan recommended a 50-foot height within 60 feet of Old Georgetown Road only for a stretch of Old Georgetown Road frontage that starts at St. Elmo Avenue and ends at Glenbrook Road, just south of the subject site. See Ex. 359(a) at 5. Mr. Brown argues that despite a focus on that recommendation by Technical Staff (and, as a result, the Applicants' witnesses), it is not directly applicable to this project.

Mr. Brown makes a compelling argument that there is no inconsistency between the recommendation for the PD-44 Zone and a 35-foot height limit, because the PD-44 Zone does not require tall buildings. He points to Section 59-C-7.13, which specifies parameters for building height and types of residential structures at various PD Zone densities. See Ex. 359(a). For instance, when less than 200 multi-family units are built, at least half of them must be in buildings with more than four stories; the rest may be in multi-family buildings with four stories or less, or in the form of townhouses or single-family detached dwellings. See *id.* Section 59-C-7.13 specifies that if a development would yield a total of 150 dwelling units or less (like the present case), there is no requirement for multi-family dwellings or buildings with more than four stories. See *id.* at 6-7. Thus, Mr. Brown argues, multi-family dwellings with four stories or less, attached or detached townhouses, or single-family detached homes can all be placed on the subject site consistent with both the recommended PD-44 zoning and the recommended 35-foot height limit on the rear part of the site. See *id.* at 7.

Applicants' counsel contest Mr. Brown's conclusion about the building height and dwelling unit type requirements of the PD-44 Zone. They note that while the PD-44 Zone does not require buildings over four stories tall in this case, it also does not require buildings to be under four stories. See Ex 360(a) at 4.

If the 50-foot height recommendation within 60 feet of Old Georgetown Road is considered applicable to the subject site, the Concerned Residents reject Technical Staff's reasons for excusing compliance. They find it irrelevant that the proposed buildings would be lower than the 11-story office building across Glenbrook Road, because the office building was built long before the Sector Plan was adopted, so its presence and height do not undermine the validity of the Sector Plan's recommendations for the subject property. See Ex. 359(a) at 8-9.

The Concerned Residents also argue, through counsel, that the proposed community center would deviate from the Sector Plan's recommendation not by eight feet, but by 31 feet. Mr. Brown contends first, as discussed above, that the 60-foot setback area should be measured from the future right-of-way line, not the current one. See *id.* at 9. Second, he argues that if the rezoning is approved

and the project proceeds to subdivision, the Planning Board will likely require a dedication along Old Georgetown Road of a 60-foot strip, not the 50-foot strip shown on the Development Plan. This would move the new right-of-way line another ten feet closer to the new buildings. See *id.* at 10-12. This argument is based on an interpretation of master plan road-width recommendations that is contradicted by a conclusion reached by Transportation Staff at the MNCPPC, although as Mr. Brown points out, this conclusion appears to have been based on information provided to Staff by Applicants' counsel. Mr. Brown contends that the information provided was inaccurate. See *id.* This question need not be decided here, in light of the Hearing Examiner's conclusion that if the 50-foot height recommendation applies to the subject site, it should be measured from the current right-of-way line.

Compatibility with nearby single-family homes is an explicit part of the Sector Plan's goals for redevelopment of the subject site. The Civic Federation and the Concerned Residents argue that the proposed development would not be compatible with nearby single-family homes. The Civic Federation's representative, Jim Humphrey, maintained that the subject site should be held to a height limit of 35 feet due to its proximity to single-family detached homes. See Ex. 348. Mr. Humphrey argued persuasively that this would be consistent with the Sector Plan's overall height scheme, which recommended a 35-foot height limit for properties adjacent to or confronting single-family homes, except in a few limited areas, like the strip of Old Georgetown Road just south of the subject site. See *id.*

The Concerned Residents offered two main types of evidence to support their conclusions regarding lack of compatibility: testimony from an expert land planner, and a three-dimensional scale model of the proposed development and the homes closest to it. The Residents' land planning expert, Kenneth Doggett, opined that the proposed development would be inconsistent with the Sector Plan and incompatible with the nearby houses, both those on Glenbrook and Rugby and those across Old Georgetown Road. See Tr. Sept. 9 at 115-16, 142. He considers the scale of the proposed buildings the primary problem. In Mr. Doggett's professional opinion, the buildings are just too massive for the site and do not allow for any reasonable transition to the nearby single-family homes. In his view, a

good transition between single-family homes and other uses requires moderately-sized buildings or extended open space. Here, he argued, the site is just too small to provide for all the density the Applicants have proposed with a reasonable transition. Mr. Doggett identified particular detriments from the proposed buildings to the adjacent homes, including increased levels of traffic on Rugby Avenue and Glenbrook Road, noise and light from the residential building and the community center that would not be blocked by a seven-foot fence, and a loss of privacy with apartment dwellers looking down on the houses from their balconies.

Mr. Doggett disagreed strongly with Technical Staff's suggestion that the residential enclave adjacent to the subject site should be replaced over the long term – he interpreted this as a suggestion that the homes should be permitted to deteriorate, something he has never seen suggested for a stable residential neighborhood like this one. See *id.* at 121. Mr. Doggett stated that there has been a lot of renovation in this little neighborhood, and while some homes are quite small, they are in extremely good condition and are not deteriorating. He noted that three of the homes have recently been sold for \$1.6 million and above, showing the ongoing value of these houses. Mr. Doggett further observed that if the proposed development is approved, it will be a signal that the nearby homes should be sold.

Mr. Doggett argued that a PD-44 development could coexist with the stable, residential community adjacent to this site if it were done at a different scale. As currently proposed, the buildings are too large and too close to the houses. He noted that the impact of the multi-family building's height would be increased by a drop-off in grade going down Rugby Road. See *id.* at 137. Moreover, he argued, a building of the size of the proposed multi-family building would isolate the houses on Rugby and Glenbrook, which already have larger buildings nearby. Mr. Doggett drew the distinction that the existing nearby buildings are at a scale that is quite pleasant, three to four stories for the most part, except for the high rise on Battery Lane that is visible through the trees. He noted that the existing larger buildings are well screened. Mr. Doggett also observed that the houses on Rugby and

Glenbrook currently have a connection with the houses on the other side of Old Georgetown Road, but the proposed multi-family building would create a barrier between them.

Mr. Doggett relied in part on the scale model, which depict the existing church building, the two buildings proposed for construction on the site, the two houses closest to the site on Rugby Avenue, the two houses closest to the site on Glenbrook Road, and two representative houses on the other side of Old Georgetown Road. See Ex. 329. The architect who made the model testified about how he prepared it, based on computer design files provided by the Applicants. The accuracy of the model has not been questioned, although the Applicants argued that it would provide a better representation of the area if the 11-story office building across Glenbrook Road and the nine-story building that has been approved on Auburn Avenue were included. Applicants' counsel argue that as a result of these exclusions, the model does not show the relationship of the proposed building to nearby high-rise structures or demonstrate the urban nature of the area. See Ex. 360(a) at 8. Mr. Estreicher, who lives in the closest house to the site on Glenbrook, testified that the 11-story building was not added to the model solely due to cost. See Tr. Sept. 9 at 175. Photographs of the model are reproduced below to give an idea of the relationship between the proposed and existing buildings, including their relative scale and the distance between them. Unfortunately no photographs were provided showing the front of the proposed buildings or the houses on Old Georgetown Road. To provide context, the aerial photograph shown on page 11 is reproduced again here, following the photographs of the model.

**Scale Model of Proposed Development and Closest Houses Seen from Glenbrook Road.
Ex. 341, upper right corner.**



**Scale Model of Proposed Development and Closest Houses Seen from
Fire and Rescue Center to the West. Ex. 341, lower right corner.**

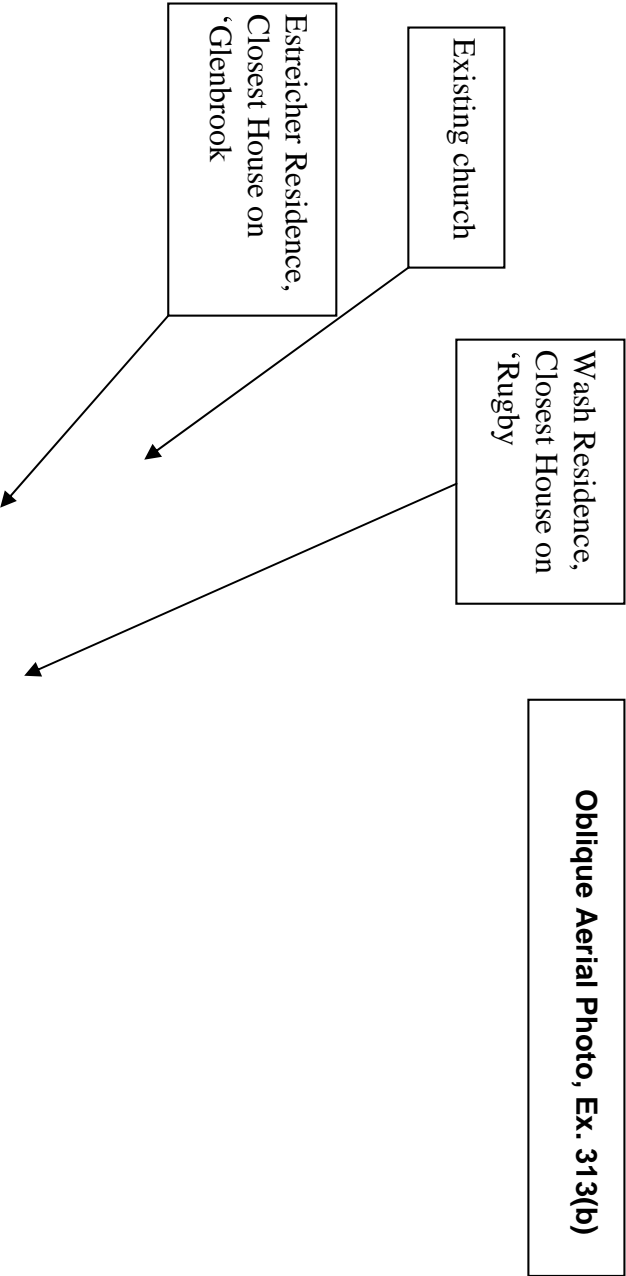


**Scale Model of Proposed Development and Closest Houses, Closer View from Glenbrook Road.
Ex. 341, lower left corner.**



**Scale Model of Proposed Development and Closest Houses Seen from Rugby Avenue.
Ex. 342, upper right corner.**





5. Hearing Examiner's Analysis

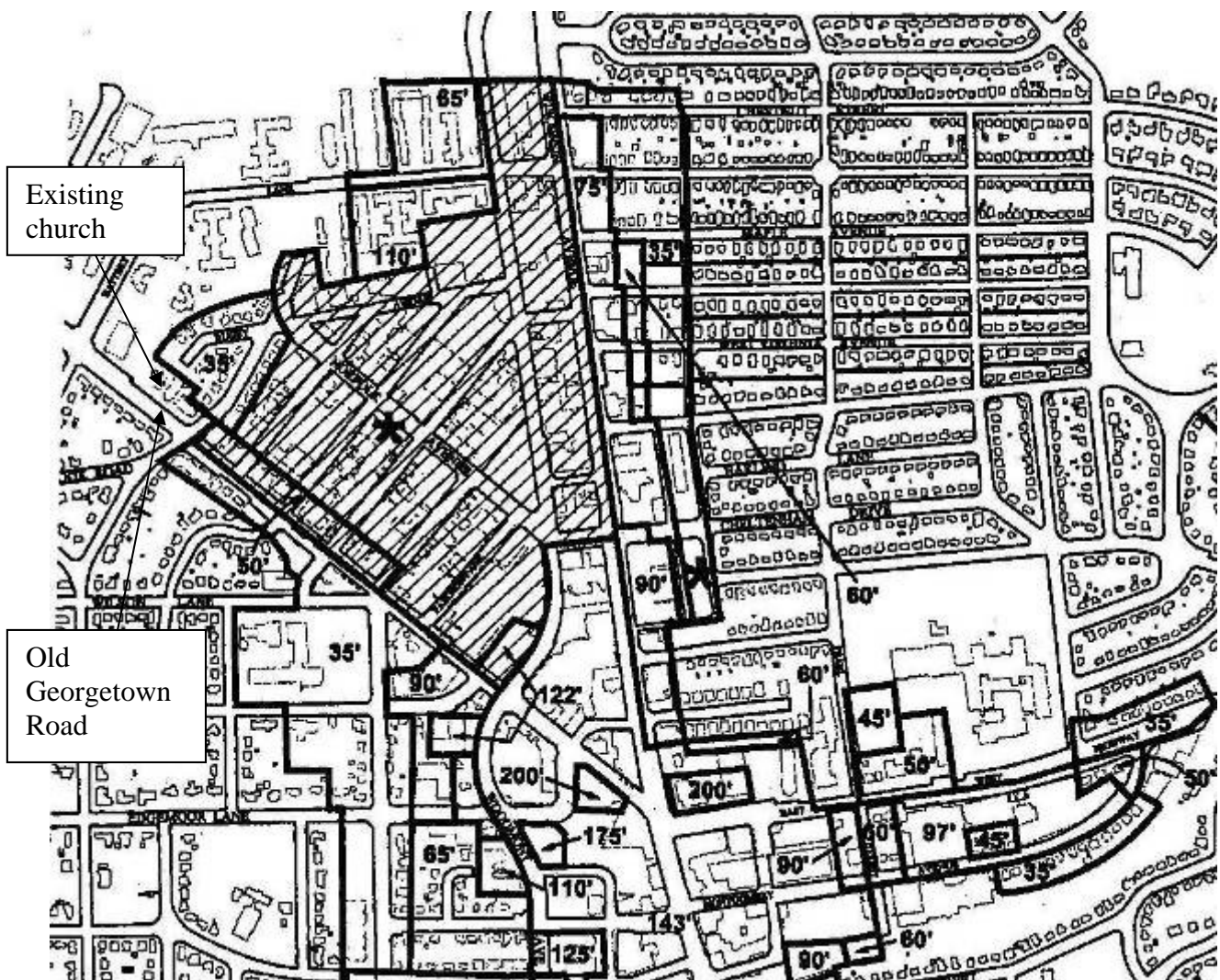
Having carefully weighed the evidence, the Hearing Examiner finds that the preponderance of the evidence supports a conclusion that the proposed development does not substantially comply with the goals and recommendations of the Sector Plan, in terms of both height and compatibility. Substantial compliance with the Sector Plan is required to support approval of the Development Plan under § 59-D-1.61(a), as well as to make a finding of compliance with the PD Zone. The Sector Plan plays a central role in the purpose clause for the PD Zone, so in this context its recommendations and objectives are entitled to particular deference. In the Hearing Examiner's view, substantial compliance means compliance with the essential elements of the plan. In this case, the Sector Plan is quite recent, dating from March 2006, so the details of the plan retain their original significance and may reasonably be considered essential elements.

The proposed development would further the Sector Plan's goals of providing additional housing and improving the pedestrian environment. It would also be consistent with the plan's specific recommendation for PD-44 zoning on the subject site, and redevelopment of the church property. It would not, however, be consistent with any of the possible interpretations of the Sector Plan's height recommendations for this property or its emphasis on compatibility with nearby single-family homes.

Technical Staff applied to the subject site the height limit recommendation of 50 feet within 60 feet of Old Georgetown Road. On the building height limit map, this recommendation is shown on a stretch of Old Georgetown Road frontage that starts at St. Elmo Avenue and clearly ends on the *east side* of Glenbrook Road, and does not include the subject site. See Sector Plan at 12. Staff offers no explanation for why this height limit was applied to the subject site except that the site is across the street from single-family homes; in the Hearing Examiner's view, this proximity argues for a 35-foot height limit, not a 50-foot one.

The Sector Plan recommended height limits on a “proposed building height” map, which updated a similar map presented from the 1994 Plan.² See Sector Plan at 12. The portion of the subject property currently occupied by the church building, the community center and the single-family structure closest to Old Georgetown Road is not included in any of the height districts on the proposed building height map. The rest of the subject site, however, including most of the land on which the new residential high-rise would sit, is within a 35-foot height district on the proposed building height map. See *id.* The relevant portion of the building height map is reproduced below.

Excerpt from Building Height Map, 2006 Woodmont Triangle Sector Plan at 12



² The Sector Plan included specific building height recommendations in a chart, as well, but the chart did not address the subject property or the adjacent residential enclave. See Sector Plan at 22.

Thus, it is clear that at least part of the proposed 114-foot multi-family building would be three times as tall as the maximum height recommended in the Sector Plan for that part of the site. Neither Technical Staff nor the Planning Board addressed this obvious inconsistency. For the front part of the property, which is outside a height district in the Sector Plan, one might turn to the 1994 Plan, on the theory that a height limit recommended in that plan would survive if not changed in the Sector Plan. Unfortunately, the building height limit map in the 1994 Plan also left that part of the subject site out of its height recommendation districts. See 1994 Plan at 39. If, as Applicants' counsel suggest, the District Council intentionally omitted a height limit for this part of the site, the best guidance available is the emphasis on compatibility with single-family homes in the specific recommendations for the site.

Assuming, for the sake of discussion, that one could reasonably apply the 50-foot height limit to the Old Georgetown Road frontage of the subject site the proposed project would not be consistent with even that recommendation. The Hearing Examiner agrees with the Applicants, as noted above, that the 60-foot setback zone should be measured from the current right-of-way line. However, the Hearing Examiner does not consider the community center's proposed encroachment into the 60-foot setback zone acceptable. The encroachment is not minor. The building is proposed to be fifty percent taller than the recommended height (76 feet v. 50 feet) for a distance of eight feet. The Hearing Examiner did not find credible the testimony by the Applicants' architect that this encroachment would not be visually noticeable. An extra 25 feet of building height in a space that is eight feet deep and roughly 80 feet wide (the width of the proposed community center) would be substantial, and would encroach into the very air space that the Sector Plan recommended, less than three years ago, should be left open to preserve compatibility with the low-scale single-family homes across the street. In the Hearing Examiner's view, a specific recommendation in a master plan document that is less than three years old deserves deference. Moreover, this encroachment would contribute significantly to the overall effect of the church being overwhelmed and rendered visually insignificant by much larger buildings on both sides.

The proposed development would also be inconsistent with the Sector Plan's more general recommendation that buildings should step down in height going from the Metro station toward the edges of the CBD. The subject property sits just outside the CBD, yet it would be taller than many of the buildings within the CBD, and much taller than the adjacent and confronting single-family homes.

The Hearing Examiner agrees with Technical Staff and the Applicants that the proposed development would not conflict with the Sector Plan's recommendation that development in Block 19 (the subject site and neighboring residential enclave) should not be allowed to isolate or surround a limited number of single-family homes. The Hearing Examiner finds Technical Staff's interpretation of this recommendation, that development within Rugby Avenue or Glenbrook Road should not be permitted to isolate a very small number of single-family homes from the rest of the enclave, to be logical and persuasive.

Compatibility with existing single-family homes both north and south of Old Georgetown Road is an important element of the Sector Plan's recommendations for the subject site, appearing not once but twice in the five-sentence paragraph that addresses Block 19. See Sector Plan at 23. In the Hearing Examiner's view, the evidence supports only one conclusion on this issue: that the proposed development would be incompatible with nearby single-family homes on both sides of Old Georgetown Road. The opinions offered by Technical Staff and the Applicants' land planner and architect on this issue were outweighed by the opinions of the Opposition land planner, an architect who happens to live in the neighborhood (both by the surname of Doggett, but not related to one another), several community members and, equally important, the documentary and physical evidence submitted by both sides.

Neither Technical Staff nor the Applicants' land planner opined that the proposed buildings would be compatible with nearby homes in terms of the elements that are typically part of a compatibility determination, such as setbacks and similarity of building size, scale and type. Technical Staff cited two reasons to support a finding that the relative size of the buildings and the small setbacks are acceptable: (i) the Sector Plan calls for the homes on Glenbrook Road and Rugby

Avenue to be redeveloped under the PD-44 Zone; and (ii) the proposed development would allow the church to continue offering important services to Bethesda-area residents. The Hearing Examiner finds it completely unpersuasive for Staff to suggest that because the Sector Plan recommends long-term redevelopment of the homes on Glenbrook and Rugby, nearby property can be developed with little or no regard for its impact on those homes. This is tantamount to suggesting that the County should pretend that those homes are already gone, and is the opposite of the Sector Plan's specific recommendation that any rezoning requests in this area should be reviewed for compatibility with nearby homes. Staff's conclusion is particularly troubling considering that this neighborhood is stable, and populated by homes that are in good condition, several of which have recently been remodeled or re-built. Despite the Sector Plan's long-term vision for this land, the level of investment in these homes – and the passionate participation in this case – clearly indicates that the homeowners like their neighborhood and intend to stay.

The evidence of the church's good works in the Bethesda community is extensive. It is undisputed that the church has made very important and positive contributions to the quality of life in Bethesda for the last 70 years, particularly for people in need. The issues at stake in this application, however, concern the impact of the proposed rezoning and development, not the impact of the church's services to the community. The Hearing Examiner in making a recommendation and the District Council in making a decision bear the responsibility to consider this rezoning application based on the applicable legal standards, which focus primarily on compatibility, compliance with the purpose and standards of the zone, and compliance with the Sector Plan. While the public interest plays a role in a rezoning decision, consistency with the public interest must be demonstrated in addition to compatibility, not instead.

The Hearing Examiner is not persuaded, moreover, that the development currently proposed for this site is necessary to allow the church to achieve its stated goals of continuing and expanding its activities at this location. As land planner Kenneth Doggett suggested, it would be possible to

redevelop this site in a way that is compatible with the surrounding area, including nearby single-family homes, if the development were done at a smaller scale.

Mr. Perrine based his compatibility conclusion on the premise that in an urban area, what matters is compatible design, which the Planning Board can take care of at site plan, rather than traditional concerns about setbacks and building size. As noted earlier, the Hearing Examiner is of the view that the District Council must make a compatibility determination at the zoning stage based on the graphic and textual binding elements, none of which address the detailed design issues Mr. Perrine identified. Moreover, given the massive size of the proposed buildings and the very small setbacks, the Hearing Examiner considers it very unlikely that anything short of a dramatic decrease in density would achieve a compatible result.

The Applicants' architect opined that the proposed development would be beneficial for the area as a great example of Smart Growth, but this does not address compatibility. He also opined that the wider sidewalk and new landscaping would enhance the pedestrian experience along Old Georgetown Road, and that replacing the surface parking lot at the rear of the site with a well-planned and manicured development would be an improvement for the neighbors on Rugby and Glenwood. The latter opinion is simply not credible in the face of the stark contrast in size between the proposed and existing buildings as shown on the Development Plan, in photo simulations submitted by the Applicants, and in the scale model.

The new buildings proposed for this site are too big, too cramped on the site and much too close to neighboring homes. They would loom over the homes on Glenbrook Road and Rugby Avenue, and would bring the height and density of the CBD past its borders, right out to the edge of the Battery Lane neighborhood. The homes on Rugby and Glenbrook would be completely overwhelmed by the presence of the massive residential building proposed here. The Estreicher home would be hit particularly hard, with its rear 40 feet from a 114-foot building and its side 20 feet from a 76-foot building and its nearby underground garage entrance. The homes on the east side of Glenbrook would get the double impact of two large buildings crammed in on either side of the church

on this site, plus a nine-story building that has already been approved backing up to the homes' backyards. The homes on the south side of Old Georgetown Road would face a high-density development of massive, tightly spaced buildings that would completely block the view of the residential enclave behind them, severing the connection between the two residential areas. The new buildings would provide a stark contrast to nearby single-family neighborhoods, rather than an appropriate transition between the residential edge and the CBD. These negative impacts cannot be justified by the fact that there is a non-conforming, 11-story building on the corner of Glenbrook Road. One tall, out-of-place building should not justify building more, which would only make the situation worse. As shown in the aerial photograph on page 11 and the height-limit photograph on page 15, the surrounding area for this site contains a wide variety of structures, with different heights and footprints. There are high-rise buildings on Battery Lane, and mid-rise buildings scattered through the area. Mr. Perrine testified credibly that the trend is to replace older, low-level buildings with taller buildings. Each of these projects should be scrutinized, however, for compatibility with its surroundings. The development proposed here cannot pass that test.

G. Public Facilities

Under the County's Adequate Public Facilities Ordinance (Code §50-35(k)), an assessment must be made as to whether the transportation infrastructure, schools, water and sewage facilities, and police, fire and health services will be adequate to support the proposed development, and whether the proposed development will adversely affect these public facilities. Both the Planning Board and the Council have roles to play in this assessment process. The Planning Board reviews the adequacy of public facilities at subdivision, under parameters that the County Council sets in the Growth Policy and in the two-year AGP Policy Element.³ While the final test under the APFO is carried out at subdivision, the District Council must first make its own public facilities evaluation in a rezoning case,

³ See *2003-05 Annual Growth Policy – Policy Element, Resolution No. 15-375*, adopted October 28, 2003. The Hearing Examiner hereby takes official notice of the 2003-05 AGP Policy Element.

because the Council bears the responsibility to determine whether the reclassification would be compatible with the surrounding area and would serve the public interest. The Council's evaluation of public facilities at the zoning stage is particularly important because of the discretionary nature of the Council's review and the opportunity for a broader review than may be available to the Planning Board at subdivision. The District Council is charged at the zoning stage with determining whether the proposed development would have an adverse impact on public facilities and, if so, whether that impact would be mitigated by improvements reasonably probable of fruition in the foreseeable future. In the present case, the Council's transportation analysis requires a review of access and circulation in addition to roadway capacity.

1. Transportation: Roadway Capacity

Pursuant to Section 59-H-2.4, the sufficiency of roadway capacity has been analyzed in the present case under the standards of the 2003-05 AGP Policy Element, which was in effect when the application was filed. Under the 2003-05 AGP Policy Element, subdivision applications are subject to only one transportation test, Local Area Transportation Review ("LATR").⁴ The Planning Board recognizes its LATR Guidelines as the standard to be used by applicants in the preparation of reports to the Hearing Examiner for zoning cases. LATR Guidelines at 1. LATR involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion at nearby intersections during the peak hours of the morning and evening peak periods (6:30 to 9:30 a.m. and 4:00 to 7:00 p.m.). The analysis involves making calculations related to the number of conflicting vehicular movements (e.g., through movements and left turns) that go through an intersection in the space of an hour, taking into account existing traffic counts, traffic anticipated from projects that have been approved but not yet built ("background" traffic), and traffic projected from the proposed development. These calculations result in a "critical lane volume," or CLV, for the intersection. If the

⁴ See 2003-05 AGP Policy Element at 6-7; *Local Area Transportation Review Guidelines Approved and Adopted July 2004* ("LATR Guidelines") at 1. The Hearing Examiner hereby takes official notice of the LATR Guidelines.

CLV exceeds the threshold that the County Council established in the Growth Policy for the applicable policy area, the developer must make roadway improvements that are projected to allow traffic to move more freely, reducing the CLV to a level below the threshold.

The Applicants performed a traffic study as required in this case.⁵ Technical Staff directed the Applicant to study the effects of the proposed development on CLVs at six nearby intersections: Old Georgetown Road at Battery Lane, Glenbrook Road, Auburn Avenue and the existing site access point; and Glenbrook Road at Rugby Road and the existing site access point. See Ex. 264(a). Technical Staff identified no approved development projects nearby, therefore no background traffic was added to the traffic counts. See *id.*, Appendix A.

Applicants' traffic engineers expect the proposed residential building and the expansion of the child day care center to generate a total of 51 new trips during the weekday morning peak hour and 55 new trips during the weekday evening peak hour. See Ex. 264(b) at Rev'd 12. These estimates are for "new" trips added to the roadway network, not counting the trips currently generated by existing activities on the site, including the existing day care center. Applicants' traffic engineers did not factor into the estimated trip generation the larger community center and associated activities because they anticipate that the church will be able to schedule most of those activities to have minimal traffic impact during the peak traffic hours. See Tr. Sept. 9 at 7-8. The Hearing Examiner greets this with some skepticism, particularly with regard to the 4:00 to 7:00 p.m. period, when many after-school activities might be ending and evening activities beginning. However, as noted below, the CLV numbers are so much lower than the applicable CLV thresholds that it would take an enormous number of additional trips to make any difference in the LATR analysis.

The traffic study concluded, and Technical Staff agreed, that with the proposed development, CLV at all of the studied intersections would be well below the applicable thresholds of 1,600 and 1,800. See Ex. 264(c), Ex. 7; Staff Report at 10. The highest CLV calculated was 1,323 at Old

⁵ The traffic study was originally prepared in November 2006. It was updated in March 2007, and corrections were issued for certain figures in May and June 2007. See Exs. 34, 264(a), 264(b) and 264(c).

Georgetown Road and Battery Lane, several hundred critical movements below the threshold where a detrimental impact is expected. At the intersections of Glenbrook Road with Rugby Avenue and the site entrance, projected CLVs are less than 170 in both the morning and the afternoon, suggesting low levels of traffic. Accordingly, the proposed development satisfies LATR requirements.

2. Transportation: Access, Circulation and Parking

There was considerable discussion about access to the site, which changed during the course of the hearing. The final proposal provided for the main vehicular access from Old Georgetown Road, at the same location as the existing driveway, with a new, 20-foot-wide driveway leading to the garage entrance. Secondary access for building residents only is proposed from the terminus of Rugby Avenue, via a driveway connecting to the Old Georgetown Road driveway and the garage entrance, accessible only by opening a card-activated gate. Applicant's traffic expert, Michael Lenhart, testified that emergency vehicles such as a fire truck would be able to drive through the gate, if necessary. Rugby Avenue is proposed to end in a cul-de-sac that would provide a turn-around for small and medium-sized trucks, as well as for passenger drop-offs. Applicants' civil engineer testified that these features would be beneficial for residents of Rugby Avenue, as well as residents of the subject site, because currently there is little space for emergency vehicles or trucks to turn around on Rugby.

Access to the garage is also proposed from Glenbrook Road, and the loading dock is shown just inside the garage entrance off of Glenbrook. Applicants' architect and transportation planner testified that child day care center customers are expected to enter the site from Old Georgetown Road, turn into the garage, drive through the garage to the day care center (either waiting in a queue to drop off or pick up, or parking in one of the church parking spaces to walk in) and exit onto Glenbrook Road. The architect suggested that the garage should be one-way during peak traffic periods for the day care center, prohibiting entry from Glenbrook Road, but the transportation planner did not consider that necessary.

Opposition witnesses, including traffic expert Donald Schofer, questioned whether the garage could accommodate all the streams of traffic expected on the site: residential, day care, and church-related. Mr. Schofer contended that the parents would want to park and walk in to the day care center, rather than standing in a line, and that the number of parking spaces would be inadequate.⁶ He also argued that if there were a line of cars waiting at a drop-off/pick-up location, other cars would not have room to back out of parking spaces, so they would be stuck. Applicants' architect, Michael Foster, conceded that cars would have to wait for the queue to move or break up before pulling out of a space, but he suggested that they would not have to wait very long, and that regular users of the garage would soon learn not to try and pull out during peak child care drop-off/pick-up hours. Mr. Schofer further argued that the large amount of traffic in the garage would create an unsafe situation for pedestrians walking through the garage, particularly with small children.

Mr. Lenhart estimated that there is room inside the garage drive aisle for eight to ten cars to line up, depending on the location of the drop-off point, without blocking access to the residential parking area. He estimated that there is room for two more cars to line up between the turn-off to the residential area and the garage entrance. He based this conclusion on parking counts that he took at the subject site, in which he found that no more than 36 parking spaces were filled at one time for the child day care center, the church and ancillary buildings. See Tr. June 24 at 143. His parking study also found that the largest number of day care center parents occupying parking spaces at one time was eight in the morning and 11 in the evening. See *id.* at 147-48.

Mr. Lenhart identified two articles from the Institute of Transportation Engineers Journal that he contended support his conclusions. See Exs. 317 and 318. An article on queuing was based on only one study during a peak period, which Mr. Lenhart conceded was not statistically significant, but he observed that it was consistent with the parking analysis that his firm conducted. See Ex. 318. The study described 94 children present on the day it was conducted, and a total of ten vehicles parking at

⁶ Mr. Schofer's contention that the new day care center might offer pre-school classes starting at a set time, rather than traditional day care where parents can drop off and pick up children at any time during the day, was nothing more than conjecture and is not addressed in this report.

the same time to drop off or pick up children. The day care center on the subject site had 72 children when Mr. Lenhart did his parking study, and he counted eight vehicles parked at one time in the morning, and 11 in the evening. See *id.* at 147-48.

An article on parking and trip generation describes a study of 29 day care centers of varying sizes, and proposes a formula to calculate the number of parking spaces needed. See Ex. 317. This formula, Mr. Lenhart explained, indicates that a day care center with 125 children, as proposed for the subject site, should have 12 parking spaces available for parents. See Tr. June 24 at 148-49. Mr. Lenhart noted that the available parking would satisfy the standard the Zoning Ordinance normally applies to child day care centers, which is one space for each non-resident staff member plus one space for every six children. He calculated that requirement at 46 parking spaces, noting that the plans show 62 spaces available for church activities, including day care. In addition, he stated that the residential parking area is shown with about 40 spaces more than the code requirement, and Bozzuto has suggested that it would be willing to consider making these available for visitor parking or overflow. Pastor Tollefson testified, moreover, that the rescue station next door allows the church to use its parking lots for overflow during special events.

Technical Staff reviewed the parking study and the two articles referred to by Mr. Lenhart, at the Hearing Examiner's request, and agreed with Mr. Lenhart's conclusions. See Ex. 321.

Mr. Lenhart identified a public parking garage with 747 spaces on Auburn Avenue, about a three-minute walk from the subject site, and two others within walking distance, which are available for special events at the church. He noted that the number of spaces proposed exceeds the total required for the principal uses: the multi-family building, the church and the child day care center.

The Hearing Examiner is persuaded by the preponderance of the evidence that the overall number of parking spaces proposed is adequate, particularly in light of the large number of spaces available at the fire and rescue property next door and in the public parking garages, and that potential conflicts regarding garage access, traffic flows and pedestrian safety within the garage are operational issues that can be worked out over time, if the project goes forward. Moreover, this is a level of detail

beyond what the District Council normally consider at the rezoning stage, and is better addressed during site plan review.

Mr. Schofer raised a concern about a driveway entrance to the adjacent rescue squad property, which meets Old Georgetown Road at the same point as the entrance to the subject site; a car entering from Old Georgetown Road would have to choose which driveway to follow when making the turn. See Tr. Sept. 9 at 74-75. He noted that the curb is marked on the Development Plan, but that continued use of that driveway could cause safety issues. The Hearing Examiner considers this also to be an issue for site plan review, if the project proceeds.

Jim Humphrey, representing the Civic Federation, argued that the availability of garage access from Rugby Avenue would generate a greatly increased volume of traffic on Rugby Avenue. He contended that residents traveling into Bethesda likely would use Rugby Avenue as their main route in and out of the site, due to the difficulty of turning left on Old Georgetown Road from the site, particularly during the morning and evening rush hours. Mr. Humphrey fears that this would increase the possibility of pedestrian accidents in this relatively quiet residential area, as well as at the unsignalized, oddly-shaped, five-way intersection between Rugby Avenue, Glenbrook Road and Norfolk Avenue. He concluded that the proposed access and circulation would not meet the “safe, adequate and efficient” standard established in the Zoning Ordinance. See Ex. 348 at 5. Other neighborhood residents also testified that the intersection between Rugby, Glenbrook and Norfolk is dangerous for pedestrians during peak traffic periods, because there are so many flows of traffic converging on one place. Local residents also testified that Glenbrook Road is a cut-through route to and from Old Georgetown Road. Residents also noted that Glenbrook is only 20 feet wide, so that when cars are parked on the street, if two cars want to pass, one has to pull over. Mr. Lenhart maintained that the traffic counts are so low on Glenbrook Road – a total of 170 trips going both ways during the morning peak hour and 159 during the evening peak hour – that it cannot legitimately be considered a cut-through route, and that the number of trips the proposed development is expected to add to the local roads is too small to make a noticeable difference.

The evidence clearly indicates that the proposed development would lead to an increase in traffic on Glenbrook Road and Rugby Avenue. Using trip assignment guidelines promulgated by the Planning Board in the LATR Guidelines, Mr. Lenhart estimated that the proposed development would generate very small numbers of trips on Glenbrook and Rugby, too small to make a noticeable difference on streets that adjoin a CBD and therefore should be expected to have some traffic. Opposition witnesses countered that many site residents who would need to turn left into or out of the site at the Old Georgetown Road entrance would, in reality, choose the Rugby or Glenbrook access points to avoid having to cross several lanes of traffic. This opposition contention seems intuitively persuasive. It is not backed up, however, by any data or other factual evidence. In the Hearing Examiner's view, therefore, it does not outweigh Mr. Lenhart's analysis, which carries the sanction of the Planning-Board-approved LATR Guidelines.

For all of the above reasons and based on the preponderance of the evidence, the Hearing Examiner concludes that the proposed development would not be incompatible with the surrounding area due to traffic or parking, and that the proposed access and circulation patterns would be safe, adequate and efficient.

3. Water and Sewer

The subject property is in Water Service Category W-1 and Sewer Service Category S-1, and will continue to be served by existing water and sewer lines. See Wallington testimony; Staff Report at 4.

4. Schools

Montgomery County Public Schools ("MCPS") reports that the subject property is in the Bethesda Elementary School, Westland Middle School and Bethesda-Chevy Chase High School service areas. See Ex. 112. Based on 107 dwelling units and average yield factors derived from a 2005 MNCPPC survey, Montgomery County Public Schools ("MCPS") expects the proposed development to generate approximately five elementary, five middle and four high school students. See Ex. 112. As measured by MCPS program capacity, enrollment at Bethesda Elementary School

currently exceeds capacity and is projected to exceed capacity in the future; enrollment at Westland Middle School currently exceeds capacity but an addition was scheduled to open in August 2008; and enrollment at Bethesda-Chevy Chase High School currently exceeds capacity but an addition is scheduled to open in August 2009. *See id.*

The Planning Board is required under the Growth Policy to determine, for each fiscal year, whether each school cluster has adequate capacity under the Growth Policy test to permit approval of additional subdivisions. The results of the Planning Board's school capacity evaluation for Fiscal Year 2009 indicate that eight school clusters, including the Bethesda-Chevy Chase cluster, exceed 105 percent of program capacity at the elementary level.⁷ As a result, any subdivisions approved during FY2009 in the Bethesda-Chevy Chase cluster will be required to make a school facilities payment. The record does not indicate whether the Bethesda-Chevy Chase cluster would pass the applicable test under the Growth Policy in effect when these applications were filed, because the Planning Board no longer applies that test.

Case law permits the District Council to deny a rezoning based on even minor increases in school overcrowding, on the theory that if a cup is full, even one more drop can cause it to overflow. *See Malmar Associates v. Board of County Commissioners for Prince George's County*, 260 Md. 292, 307, 272 A.2d 6 (1971). However, in light of the small number of students the proposed development is expected to generate, the Hearing Examiner does not consider denial to be justified on this basis.

H. Environmental Issues and Storm Water Management

The subject site is not located in an area with special environmental protections, nor does it have natural features of any significance. Technical Staff states that the Applicants would be able to satisfy the applicable afforestation requirement under the forest conservation law by planting canopy

⁷ The Hearing Examiner hereby takes official notice of the Planning Board's letter of July 8, 2008 to the Council President and the County Executive.

trees, as shown on the Preliminary Forest Conservation Plan. See Staff Report at 11; Ex. 283. The site currently has several specimen trees, and several Opposition parties objected to their removal. Applicants' civil engineer, Edward Wallington, testified that some of the trees were in bad condition at the start of this case, and the record indicates that two trees had to be removed during the pendency of this case due to their deteriorating health. Mr. Wallington testified that he and Technical Staff readily agreed that the existing trees would not prosper in a high-density environment, and it would be better to remove them and plant new ones.

Mr. Wallington testified that stormwater management would be provided through three filtering facilities on different parts of the site, as well as a green roof on the multi-family building that would cool stormwater and slow its rate of release. He noted that the concept stormwater management plan was approved by the Department of Permitting Services, and that the plan would improve the treatment of run-off compared to current conditions.

I. Community Participation

Representatives of two non-profit organizations that serve low-income residents of Montgomery County (Bethesda Cares and Interfaith Works) testified in support of the proposed development, arguing that the re-zoning should be permitted to allow the church to continue and expand its work as part of the County's network of social service providers. A representative of the Washington Smart Growth Alliance testified that her organization recognizes the proposed development as a "Smart Growth" development, due to its urban location, proximity to transit, density, pedestrian-friendly streetscape and support for the church's provision of social services. The testimony of each of these witnesses is summarized in Part IV below.

Seven community members testified in opposition to the proposed development. Four are residents of Glenbrook Road; two are Battery Park residents and the current and former presidents of its citizen's association, although the association did not take a formal position in this case; and one, Jim Humphrey, represented the Civic Federation. Their testimony, which is summarized in detail in

Part IV below, presented the view that the size, bulk and location of the proposed buildings would be incompatible with nearby single-family homes, both those on Glenbrook Road and Rugby Avenue and those across Old Georgetown Road. Some witnesses contended that the proposed development would also be incompatible due to its traffic impacts on the quiet, residential Glenbrook Road and Rugby Avenue, and the oddly-shaped, unsignalized, five-way intersection between Glenbrook, Rugby and Norfolk Avenue. Mr. Humphrey's contentions that the proposed development would be inconsistent with the Sector Plan are addressed in Part III.G above.

The record contains approximately 140 letters in support of the proposed rezoning from church members and other supporters of the church. Many of these letters follow the pattern of one of several form letters. The individualized letters are summarized first, followed by each of the form letters.

Individualized Letters in Support

The church's senior pastor of 24 years, Marvin Tollefson, wrote that he has observed many changes and community transitions, and the need for support services in Bethesda has never been greater than now. See Ex. 215. He described the delivery of human services as near and dear to the people of the church, which provides services including family therapy, senior day care, child day care, performing arts, a homeless lunch program, a 12-step and support group program, a place for ethnic congregations to worship, public environmental forums, Toys for Tots, backpacks for the homeless, cell phone collections for abused women, refuge for Katrina victims and more. Reverend Tollefson stated that the proposed redevelopment is consistent with pressing community needs in Bethesda, and noted that the church has devoted considerable resources since 2000 to analyzing plans that would allow it to remain and serve the Woodmont Triangle community.

Reverend Tollefson wrote that while the church has served the community faithfully since 1934, a small number of its neighbors have now "elected to minimize the long standing, visible commitment that Christ Lutheran has made to the community" by raising objections, such as increased traffic congestion and building shadows. He stated that the church has made changes to address these

concerns and will continue to work with the local community on more changes. Reverend Tollefson urges decision makers to factor in the “positive, daily social impact” of the church on the quality of life in Montgomery County, rather than judging this matter on a strictly technical basis, noting that the Planning Board has given its unanimous support. See Ex. 215.

Patricia Tollefson wrote a similar letter, noting the church’s services are provided without regard to religious affiliation, and that the church has been an asset to the community since the 1930s. See Ex. 219.

Community Ministry of Montgomery County reports that the church is part of the CMMC, a 35-year-old interfaith coalition of 140 congregations working together to meet the needs of the poor in Montgomery County, and is an important service provider. See Ex. 137. CMMC considers the proposed development to be thoughtful and responsive to the community’s needs, and notes the Planning Board’s unanimous support. “It is always troubling when neighbors reject what is beneficial for the greater good. We hope that the Church’s many grateful neighbors outnumber its challengers and welcome the social services that the church provides for many years to come.” Ex. 137.

Lutheran Social Services of the National Capital Area (“LSS”) wrote that it has worked with community organizations throughout the Washington metropolitan area for 90 years to promote self-sufficiency, social justice and the inherent worth of each human being, and that the church in this case has been an important partner. See Ex. 236. LSS considers the proposed redevelopment plan responsive to the needs of the community, thoroughly considered and well developed.

Bethesda Cares, Inc. has served lunch to the homeless out of the church’s social hall for 18 years. See Ex. 91. Bethesda Cares supports the proposed redevelopment because it would help broaden and strengthen the church’s mission to provide community services to the Bethesda community, and would create affordable housing units.

Mi Refugio, Inc. wrote that through its endowment fund, the church in this case has partnered with Mi Refugio over a number of years to provide education, food and clothing to needy children. See Ex. 214. Mi Refugio described the church as a vibrant and responsible member of the Bethesda

community for more than 70 years, noting that the proposed development would allow its services to be expanded and create affordable housing units. The letter requests favorable consideration of the present application, despite the “technical objections” raised by neighbors.

The Nonprofit Centers Network, a national network of community-based nonprofit facilities, described the church’s proposed development as a cutting-edge strategy to bring organizations together under one roof, improving the ability of non-profits to collaborate in providing the highest quality service to their clients. See Ex. 187. The letter stated that centers like the one proposed in this case bring tremendous benefits to their communities, providing meeting places for people to come together and build relationships and raising the visibility of important services offered by non-profits, and can serve as engines of community-oriented economic development.

The current president of the Board of Directors for the Christ Church Children’s Center, a parent of two children at the center, wrote that the center provides a vital service for area working parents. See Ex. 237. The writer stated that currently, the day care center is housed in two buildings on either side of the church parking lot, so parents, children and staff have to walk through the parking lot frequently. This creates a significant safety issue, in light of the many vehicles that cut through the church parking lot. The child day care center also has concerns about unauthorized pedestrian traffic through the parking lot, walking within feet of the children.

Two church employees wrote that the proposed rezoning would build on the church’s heritage of community service. See Exs. 52 and 85. One wrote that the church receives phone calls and visits every day from people looking for help with food and other life issues. See Ex. 85. The other noted that the buildings are very old and in constant need of repair, which no longer makes sense financially. See Ex. 52.

Patricia A. Corley, a member of Sisters of the Holy Names, a Catholic religious community, has been a social worker in Montgomery County for 30 years, and provides child and family therapy at her office in the church on this site. See Ex. 235. She stated that the church’s congregation is largely from the Bethesda area and provides excellent social services to a diverse, needy population. She

expects that the church will be a likely resource for child care and recreation services when the many new arrivals from Walter Reed Hospital move to Bethesda Naval Hospital and the National Institutions of Health, and that the proposed residential building would provide additional housing choices for new arrivals. Ms. Corley stated that the small group of local residents who have sought legal help to stop the church's proposed expansion may not realize that the church has long been an outstanding and upstanding neighbor, and seeks to redevelop to continue supporting the health and safety of the community. She suggests that these residents must recognize that Bethesda continues to grow and change, and that the entire Woodmont Triangle area will be transformed in the next ten years into a much more active district, with the support of county officials, noting that change is hard for many people, but it is the natural order of life. Finally, she stated that the church is a valued asset to the community, and deserves the right to improve its property like any other property owner.

Louse Clark, an early childhood education specialist, worked with the church to start a licensed child development center. See Ex. 222. She noted that the church had allocated additional resources to fulfill a commitment to provide continuous child care for children from six weeks of age through kindergarten, and that lack of affordable, quality child care directly affects the workforce and local employers. Ms. Clark notes the objections by some neighbors and changes the church has made in response, and expresses confidence that the church will continue to work with the local community.

Brian J. Depenbrock, a licensed clinical social worker who has provided psychotherapy services at the church and observed its many fine social services, supports the church's plan to remodel its property, provide housing and centralize social and recreation services. See Ex. 182. He repeated many of the points in Reverend Tollefson's letter about the church's role in the community and the need to evaluate this application with regard to that role, and not just on technical grounds.

Diana Echenique, a single mother and former resident of New Orleans, wrote to describe how the church provided housing for her, her young son and her mother after they lost their home due to Hurricane Katrina and ended up in the Washington area. She stated that the church provided food, a

child's bed, and even toys for her son, without asking for anything in exchange, even religious affiliation. See Ex. 164. She described the church as an exemplary organization, committed to the community, and requested approval of the rezoning so the church can stay on its property and continue its social services.

Mark E. Miller, a longtime church member, stressed that a considerable investment of volunteer time and money has gone into making this project feasible, that the church has already invested hundreds of thousands of dollars into this project, and that all the money paid by the developer will go back into the new church facilities. See Ex. 138. He also noted that if this project does not go forward, the church will likely have to sell the property to a developer, so there will be no community center and none of the services the church currently provides. He suggested that larger issues are at stake than the interests of several residents, as the proposed project will benefit many and the interests of the local residents serve few. Mr. Miller also suggested that the alternative for the neighbors could be much worse.

Eugene A. Watkins, a church member since 1941, wrote that the church has continuously served the community and wants to continue doing so by remaining at its location in Bethesda. See Exs. 67 and 136. He considers the proposed development consistent with managed growth for the Bethesda Metro area, as it is within easy walking distance to transit and convenient services. Mr. Watkins argued that the church's plan fits well with most residents' vision for growth in the County.

Dorothy Davis Hofstad, a church member since 1964, was a member of the Church Council when the redevelopment project first began, and heartily endorses it. See Ex. 55.

Mary H. Merrick, a member of the church since 1954, echoed other letters' descriptions of the church's services to the local and global community since 1934. See Ex. 84. She mentioned one church outreach program in which she was active, the organization of a highly successful school for children with learning disabilities, founded in 1961 as the Christ Church Child Center and now known as the Ivymount School, located on Seven Locks Road. Ms. Merrick "know[s] the strength and

determination of this congregation and dedication to serving the community” and strongly urges approval of the rezoning.

Andrew P. Masetti, a member of the church for four years, has experienced the church's commitment to the community many times over. See Ex. 99. He stated that through activities such as providing food and clothing to the hungry and poor, creating outreach programs to educate people of all faiths on the importance of improving the environment reducing greenhouse gas emissions, and providing aid to people in impoverished nations, the church has provided out-sized service to the local community and others.

Form Letters in Support

1. Support for the church's “very necessary plans to remodel parts of its aging property to provide centralized social services in an environmentally sound setting.” Ten letters, Exs. 154 (from the Greater Bethesda-Chevy Chase Chamber of Commerce), 155, 163, 165, 166, 177, 178, 205, 224 and 234. The church's proposed redevelopment has many smart growth elements. The church's positive, daily impact on the quality of life in Bethesda should be factored into this decision, rather than making the decision on a strictly technical basis, when the Planning Board has already given its unanimous approval.

2. Church members who support the church's many fine social services and the “very necessary plans to remodel and expand parts of our functionally obsolete property.” Twenty-five letters, Exs. 139, 142, 146, 147, 159, 160, 167-172, 180, 186, 189, 193-200, 211-212. The letters describe some of the church's many services such as child care, lunches for the homeless and Toys for Tots, noting that the church has been a fixture in Bethesda since the 1930s and has always been a good neighbor. “Now, when it needs the very community it serves to show support of its role to sustain this social services network, some small number of our neighboring residents and their lawyers have evidently elected to minimize the longstanding, visible commitment that Christ Lutheran has made to the community [and] instead raised objections, such as increased traffic congestion and building shadows.” The church has made changes to its plans to address these concerns, and will continue to

work with the local community on additional changes. The church's positive, daily impact on the quality of life in Bethesda should be factored into this decision, rather than making the decision on a strictly technical basis, when the Planning Board has already given its unanimous approval. The director, assistant director and Chair of the Board of Directors of the on-site day care center submitted letters substantially the same as this form, as did five "longtime observer[s] of the many fine social services that [the church] provides." See Exs. 158, 188 (from the Evangelical Lutheran Church in America, Metropolitan Washington, D.C. Synod), 201, 202, 217, 220, 225 and 228.

3. Concerned members of fellow religious institutions writing in support of the church and its excellent social services. Forty-six letters, Exs. 184, 185, 232(a) – (nn) and 233 (from the Bethesda Presbyterian Church). The letters quote the 2007 Montgomery County Planning Department Survey of Faith Based Organizations, which describes the vital role played by faith-based organizations in the provision of social services in the County, and the increased demand for such services. "To limit the ability of religious organizations to expand is to limit our continuing viability as a valued institution in this region. . . . Land is extremely difficult to find in Montgomery County. Since public policy effectively foreclosed growth north and west in the county, many religious institutions are stymied geographically and face the possibility of closing or moving out of Montgomery County. . . . To allow a few people to prevent the church from following its plans to modernize is to ignore the larger picture that affects all faith-based institutions." *Id.*

4. The church is an important part of the nonprofit network that provides regular, constant services to individuals and families in Bethesda, and its work must be supported, not hindered. Sixteen letters, Exs. 150-153, 162, 175, 176, 181, 190, 191, 192, 203, 216, 218, 221 and 223. There is a growing need for social services in Bethesda. If the church's redevelopment plans do not go forward, "it could serve to further imperil key feeding programs and fray the nonprofit social network that is so important to the community." *Id.*

5. Members of The Center for Family Process who frequently use the church's facilities for community work. Exs. 229, 230 and 239. The project has been approved by the Planning Board and

received the prestigious Smart Growth Alliance recognition, identifying projects worthy of strong consideration and approval by the local community. The small group of local residents who have sought legal help to stop the church's proposed expansion may not realize that the church has long been an outstanding and upstanding neighbor, and seeks to redevelop to continue supporting the health and safety of the community. These residents must recognize that Bethesda continues to grow and change, and that the entire Woodmont Triangle area will be transformed in the next ten years into a much more active district, with the support of county officials. The church is within easy access to Metro and other public infrastructure, and its congregation is largely from the Bethesda area. Change is hard for many people, but it is the natural order of life. The church is a valued asset to the community, and deserves the right to improve its property like any other property owner. Many of the same points were made in two other letters from individuals not associated with The Center for Family Process. See Exs. 143 and 226.

6. A number of people who participate in chamber music concerts at the church, as performers and/or listeners, wrote similar letters. Exs. 57-60, 61, 64, 76, 80, 83, 140, 141, 144 and 145. They support the church's redevelopment plans to continue its mission and valuable community services in Bethesda. One letter notes the church's commitment to stewardship of the Earth and positive environmental practices. Ex. 140. Two of these letters add that the County should recognize the unique role of nonprofits, "especially those that provide public services that government otherwise would be tasked with providing." Exs. 144 and 145. The church is a highly valued institution providing an array of social services to needy, often hidden individuals and families in affluent Bethesda, as well as adding cultural enrichment through concerts. "To reduce this institution's future to a simple debate over the technical merits of its development plans is to ignore its intrinsic value. . . . If you do, indeed value [the church] and its social mission, please act accordingly" Exs. 144 and 145.

7. Longtime members of the church congregation who support the proposed redevelopment to allow the church to continue offering their mission and community services to the Bethesda

community, building on their heritage and sustaining it. Nineteen letters, Exs. 53, 54, 56, 58, 62, 63, 65, 66, 69-74, 86, 88-90.

8. Five members of the Church Council at the subject church, who express their strong support for the proposed redevelopment to allow the church to continue offering their mission and community services to the Bethesda community, building on their heritage and sustaining it. Exs. 78, 79, 81, 87 and 92. The letters state that the church studied its many options over the years to expand its ministries in Bethesda, and that the proposed redevelopment is the best way for the church to continue to serve those in need of child care, a hot lunch, a place for a support group, family counseling or a place to worship. One letter adds that the gymnasium would allow the church to create a youth outreach program, to be used for a variety of sporting and other youth activities, including indoor tournaments where appropriate. See Ex. 92.

9. Longtime observers of Montgomery County who believe in its leaders and note that many of the County Executive's priorities are part of the church's existence and future, including serving the growing number of immigrants and seniors, adding positive youth development programs, increasing affordable housing, capitalizing on existing infrastructure, protecting the environment by adding green space and concentrating building in less space, and delivering much-needed public services creatively and efficiently. Exs. 156, 157, 179, 183, 204, 208, 209 and 210. These letters note the Planning Board's unanimous support for this project and the opposition of some residents that could imperil the church's 70-year existence. They argue that the plans should be approved based on the church's reputation and its focus on improving our community.

10. Seven fairly new members of the church who express their support for the "very necessary plans" to remodel and expand parts of the property. See Exs. 148, 149, 161, 173, 174, 206 and 207. The services the church provides to the Bethesda community attracted these members to join the church, which has been a fixture in Bethesda since the 1930s and has always been a good neighbor. The church has made changes in its plans to respond to concerns raised by a small number of neighbors, who have chosen to minimize the church's longstanding, visible commitment to the

community. These residents must recognize that Bethesda continues to grow and change, and that the entire Woodmont Triangle area will be transformed in the next ten years into a much more active district, with the support of county officials. This zoning decision should be made taking into account the church's daily positive impact on the quality of life in Montgomery County.

The record also contains 43 letters in opposition to the proposed development, mostly from residents of Glenbrook Road, Rugby Avenue and Battery Park. Some of these also follow a form letter template. The individualized letters are summarized first, followed by the form letters.

Individualized Letters in Opposition

Sara Gilbertson, president of the Battery Park Citizen's Association testified at the hearing and wrote that the proposed rezoning would be incompatible with height and traffic in the Battery Park neighborhood. See Ex. 117. She argued that the height of the proposed buildings would not be compatible with the neighborhood, and noted that there would be an intrusion of non-permitted height into a setback area. In her view, "the Planning staff audaciously decided to seek out and even to misrepresent self-serving examples of other low-quality commercial development to dismiss the unparalleled impact of this project on the single-family homes that are the relevant legal standard, and to rely on disingenuous statements to approve the proposed rezoning." Ex. 117.

Herbert Estreicher, who owns and lives in the home closest to the subject site, which would be the most directly affected by the proposed development, testified at the hearing and wrote in opposition. See Ex. 122. Mr. Estreicher argued that the proposed buildings would be too large and too close to his home, and would lead to loss of privacy, loss of light, impedance of air circulation, noise, and increased traffic congestion and flow. He considers the proposed seven-foot privacy fences completely inadequate to buffer a 114-foot building. He suggests that the Applicants make the building slightly smaller to save the few tall trees that currently line the rear of the property, which would provide better privacy. Mr. Estreicher objects to Technical Staff's attempt to justify the proposed development on grounds that the adjacent single-family neighborhood is intended for eventual redevelopment under the Sector Plan. He argues that this neighborhood has a number of newly-built

and renovated homes and maintains a stable residential character, and that its residents have a right to peaceful enjoyment of their homes. In his view, the Sector Plan does not authorize or envision extinguishing the rights of current residents to continue enjoying their homes. Mr. Estreicher notes that the Planning Board, in recommending that the Development Plan be considered illustrative so that compatibility issues could be worked out at site plan, failed to actually consider the question of compatibility. He argues that the compatibility decision must first be made at the rezoning stage, and observes that in this case, it is not a question of minor details, but rather of fundamental questions of compatibility that cannot properly be deferred to site plan review. Mr. Estreicher notes that site plan review offers none of the procedural safeguards of the rezoning process, such as the opportunity to be heard on the record by a hearing examiner, to cross-examine the applicant's expert witnesses, and to seek judicial review of an adverse determination.

Bernard and Patsy-Ann Wolfe own and reside in the homes three doors down from the subject site on Glenbrook Road. They testified at the hearing and wrote in opposition. See Ex. 124. Mr. and Ms. Wolfe write that they, as well as many of their neighbors, have made substantial investments in their homes, indicating that this is a neighborhood of permanent residents. They argue that the proposed redevelopment would not comply with the purpose and requirements for the PD-44 Zone, would not be compatible with adjacent single-family homes, would not provide safe, adequate and efficient points of external access for traffic, and would destroy natural vegetation and other natural features of the site.

Mr. and Ms. Wolfe contend that the aesthetics of their neighborhood would be overwhelmed by the construction of "giant towers" next to single-family homes. They note that the 11-story office building on the corner of Glenbrook and Old Georgetown Roads is separated from the nearest home by a wide parking lot, unlike the very small building setbacks proposed in this case. They are concerned that the proposed development would bring additional traffic to Glenbrook and Rugby, and to the already-crowded intersection of Rugby Avenue, Glenbrook Road and Norfolk Avenue, creating safety hazards for residents. They note that the Planning Board's recommendation was based on an

assumption that the existing single-family homes in the area are intended for eventual redevelopment in the Sector Plan. Mr. and Ms. Wolfe contend that theirs is a stable neighborhood whose residents have the right to the preservation of their property and peaceful enjoyment of their homes. They argue that the Sector Plan does not authorize or envision extinguishing the rights of current residents to continue enjoying their homes, but rather calls for reviewing rezoning applications for compatibility with existing single-family homes.

Steven A. Teitelbaum, past president of the Battery Park Citizens' Association, testified at the hearing and wrote a lengthy letter in opposition. See Ex. 300. He lives about five houses down Exeter Road from the subject site, and the church is clearly visible from his front porch. Mr. Teitelbaum is a real estate transactional lawyer, describing himself as "temperamentally in favor of development and opposed to NIMBYs," and a member of the American Planning Association. He wrote in his individual capacity, but believes that his view reflect the input of Battery Park residents.

Mr. Teitelbaum argues that compatibility is the key finding that the District Council must make in a rezoning, and that such a finding cannot be made in this case. He notes that the Planning Board essentially found that this project was not compatibility, but that the question of compatibility should be deferred to site plan review. Mr. Teitelbaum suggests that the District Council cannot "duck the issue" like the Planning Board. He argues that Technical Staff also failed to make a fundamental compatibility finding with regard to nearby single-family homes, focusing instead on nearby office buildings. He notes that the Sector Plan called for rezonings in this area to be compatible with existing single-family homes, not office buildings. Mr. Teitelbaum considers comparing any project to the "architectural, zoning and planning white elephant of 7979 Old Georgetown Road [(the 11-story office building on the corner of Glenbrook)] the abdication, not the exercise, of professional planning." Ex. 300.

Mr. Teitelbaum notes that even the Planning Board and its Staff acknowledge that the proposed community center would be inconsistent with a Sector Plan height recommendation. He

finds it patronizing for Staff to describe this as a “limited” intrusion of excess height into the restricted area, considering that Bethesda residents litigate over alleged inches of horizontal or vertical excess.

Mr. Teitelbaum notes that Staff refers to the office building diagonally across Old Georgetown Road from the site as a four-story building, failing to point out that it has only three stories above grade and is no wider than a house, making it vastly less intrusive than the buildings proposed in this case. Mr. Teitelbaum argues that Staff’s statement about the church steeple remaining the tallest structure on the site misses the point, that the sheer mass of the two new buildings would overwhelm the church steeple, which will become little more than a minor decorative element.

Turning to concerns about pedestrian safety, Mr. Teitelbaum notes that contrary to Technical Staff’s assertion that existing intersections have crosswalks and pedestrian signals, the nearest intersection, Old Georgetown and Glenbrook Roads, does not have a traffic signal, nor does the intersection of Glenbrook, Rugby and Norfolk.

Mr. Teitelbaum considers support for this project based on streetscape improvement premature, since that will be an issue for consideration at a later stage, not a zoning. He argues that all three schools that would serve this development are overcapacity and expected to remain so. Perhaps Mr. Teitelbaum is unaware of planned capacity increases at the local middle and high schools.

Mr. Teitelbaum expresses dismay at Technical Staff’s repeated references to important community functions that the proposed community center would serve. From his perspective, the church already provides the important community functions in its current space, and the only new function would be a private gym, with no benefit to the local community. The Hearing Examiner notes that although the evidence is not clear as to exactly how the gymnasium would be used to benefit the local community, it appears to be inaccurate to call it a “private” facility. Mr. Teitelbaum objects to Technical Staff’s emphasis on benefit to the “wider community” rather than examining impacts on homes located nearby. Mr. Teitelbaum’s letter closes by stating that the proposed rezoning would be inconsistent with the Sector Plan and with good planning practice.

Robin Strachan and Paul Ravitz own and reside on Glenbrook Road, almost directly across Glenbrook from the subject site. See Ex. 123(r). They have made substantial improvements to their home and intend to live there until they are “ready for the nursing home.” They are concerned that the proposed development would negatively impact the safety of their neighborhood due to added traffic on Glenbrook Road and Rugby Avenue. They note that parking is allowed on only one side of Glenbrook Road, and that because many homes have shared driveways, on-street parking is a necessity, leaving room for only one car to pass at a time. In their view, the increased traffic volume from the proposed development would present an enormous safety hazard.

Ms. Strachan and Mr. Ravitz contend that the proposed development would loom over existing residential homes and be grossly incompatible. They argue that the proposed development would cause a substantial increase in noise, with 107 dwelling units and a new community center compressed on the same lot as the church. Like the Wolfs, they contend that the aesthetics of their neighborhood would be overwhelmed by the construction of “giant towers” next to single-family homes. They note that the 11-story office building on the corner of Glenbrook and Old Georgetown Roads is separated from the nearest home by a wide parking lot, unlike the very small building setbacks proposed in this case. They note that the Planning Board’s recommendation was based on an assumption that the existing single-family homes in the area are intended for eventual redevelopment in the Sector Plan. They contend that theirs is a stable neighborhood whose residents have the right to the preservation of their property and peaceful enjoyment of their homes. They argue that the Sector Plan does not authorize or envision extinguishing the rights of current residents to continue enjoying their homes, but rather calls for reviewing rezoning applications for compatibility with existing single-family homes.

The Strachan-Ravitz letter was also submitted, nearly word-for-word, by Arlene Bruhn, who lives on Glenbrook Road farther away from the subject site. See Ex. 130.

Lilia Topol, a resident of Battery Lane, opposes the proposed redevelopment on grounds that its density and scale would increase traffic and reduce sun light to her community. See Ex. 135(a).

She argues that the proposed development would be incompatible with the existing single-family neighborhood and suggests that a garden-style townhouse complex would better serve the community.

Van Doorn Ooms and Theodora Ooms, residents of Battery Park, write in opposition on grounds that the proposed project would adversely affect their neighborhood in terms of aesthetics, safety and especially traffic. See Ex. 131. They argue that it would be hazardous to add more traffic (the Ooms estimate 500 owners, families, friends, parishioners, workers and visitors) to the already congested access points on Glenbrook and Old Georgetown Roads.

Arthur R. Dornheim, a resident of Battery Park, fears that the proposed development would destroy the residential appearance of both sides of Old Georgetown Road beyond Glenbrook Road, as well as adding noise and reducing air quality. See Ex. 134. He is most concerned, however, about added traffic problems from the new residents and gym users. Mr. Dornheim suggests that the height of the adjacent rescue squad building should serve as a model for the heights of new buildings.

Marion R. Herz, a Battery Place resident, wrote in opposition to the “perpetual development “ in Bethesda, arguing that Bethesda cannot maintain its sense of community and quality of line if this development is allowed to occur. See Ex. 135(c). Ms. Herz notes that every open space is being considered for development, mostly for a mix of offices, retail and condominiums. She cites nine individual development projects in Bethesda, in addition to the move of the Walter Reed medical facility to the National Naval Medical Center and the development underway on the old Giant site on Arlington Road. Ms. Herz states that the area is experiencing a housing slump and a glut of unsold, high-priced condominiums. She contends that even with the required MPDUs, these vast majority of these homes will be affordable only to upper-income people, driving everyone else out of Bethesda and forcing many of its worker to commute back and forth. This, she argues, makes traffic and pollution problems worse and detracts from population diversity and quality of life.

Form Letters in Opposition

1. Seven letters from residents of Rugby Avenue or Glenbrook Road who argue that the three-dimensional model of the proposed project that was submitted in this case dramatically demonstrates its incompatibility with existing homes in the area. See Exs. 323, 324, 325, 351, 352, 353 and 354. They argue that the proposed project would fundamentally change the basic character of the neighborhood due to the “astonishing” mass of the buildings and their very small setbacks. These residents contend that in finding compatibility because the nearby neighborhood is recommended for eventual redevelopment, Technical Staff ignored the fact that there are three large, newly constructed homes on one side of Glenbrook, and a number of older but stable homes on both Glenbrook and Rugby, not a series of vacant lots. They argue that existing residents have the right to continued peaceful enjoyment of their homes. These letters describe obvious problems for the adjacent properties of loss of privacy, loss of light, impeded air circulation and noise. They describe obvious problems for homes farther away of increased traffic and congestion, urbanization of a charming residential area, and the “sheer visual ugliness of the massive buildings proposed for the site.” They object to cutting down a dozen or so tall trees, noting that a green roof does not provide the benefits of ground level vegetation. These writers are also concerned about increased traffic, in particular on Rugby Avenue.

These letters note that the Planning Board’s recommendation was couched in a suggestion to leave the question of compatibility to be resolved at site plan review, which the writers believes would violate the District Council’s responsibility under Section 59-D-1.61 to make a finding regarding compatibility. The letters close by describing the proposed project as the wrong development for the neighborhood.

2. Three letters from residents of City Commons on Battery Lane, raising concerns about how the proposed development might reduce sunlight to their homes, whether the current pedestrian passage between the rescue squad parking lot and Rugby Avenue would be preserved, whether the proposed residential building is appropriate for a neighborhood zoned for much lower buildings, and

how the addition of almost 200 cars will influence traffic and congestion. See Exs. 135(b), (d) and (e). The writers suggest that the only way to resolve most of these issues is to significantly downscale the project.

3. Twenty-two letters from Battery Park residents opposed to this “massive project” that will have an adverse impact with regard to aesthetics, safety and traffic. See Exs. 115, 116, 118, 119, 120 and 123(a) through (q). The writers contend that the proposed project would directly violate the 1993 General Plan Housing Objective 5E, which seeks to “maintain the safety and quality of the neighborhoods.” They argue that the “monstrous” structure proposed here will also violate the Sector Plan’s call for compatibility with existing single family homes on this site, and Housing Objective 5C from the General Plan, which states that special care should be taken when introducing new uses to old neighborhoods. The writers argue that sunlight to their homes will be compromised, lights from the new structures will infiltrate their homes at night, noise levels will escalate, pollution from cars will increase, and traffic and pedestrian incidents will likely increase. These letters note that the new community center would be inconsistent with the Sector Plan’s height recommendation, that its height will have adverse effects on surrounding homes, and that its height and setback should be modified. These letters further argue that the neighborhood does not possess adequate crosswalks or traffic signals, and that the points of access on Glenbrook and Old Georgetown would be dangerous for pedestrians and create a nightmare for commuters.

IV. SUMMARY OF HEARING

A. Applicant’s Case in Chief

1. Phil Perrine, land planner. Tr. June 2 at 21 – 160; June 6 at 221-26; June 24 at 12-27.

Mr. Perrine was designated an expert in land planning. He is personally familiar with the property in question, the rezoning request, the master plan and the requirements of the zone. See Tr. June 2 at 24.

Mr. Perrine outlined a suggested zoning neighborhood for this case, and described Technical Staff's somewhat larger neighborhood boundary as acceptable. See *id.* at 28. He then described current conditions on the subject property and nearby properties, and outlined the proposed development.

Mr. Perrine reviewed and analyzed the Sector Plan, noting that the existing zoning of the subject property, Glenbrook Road and Rugby Avenue is R-60, whereas the proposed zoning is PD-44. *Id.* at 48. Mr. Perrine emphasized the purpose of the Sector Plan, page 1, first paragraph to consider redevelopment that provides for more housing close to the Metro Station while retaining quality of life and ambience. The Council looked at increasing building height, recommending PD-44 for the subject property and recommending CBD-2 for other properties instead of CBD-1 to achieve the additional housing that was the essence of the Sector Plan. *Id.* at 49. Building height was increased from 50 feet to 90-143 feet in the area south and east of the Glenbrook/Rugby area while Georgetown Road maintained the 50 foot height limit for the first 60 feet back from the road. *Id.* at 50-51.

Mr. Perrine opined that the subject project conforms to these new specifications. Further, he maintained that the subject project does not isolate single family homes, as it is on the edge of the adjacent single family homes. Moreover, the single family homes would still have access to walkways to the park and roads further east. *Id.* at 51.

Mr. Perrine then discussed the compatibility of the proposed project with the surrounding area, focusing on five specific areas: (1) historical master plan recommendations; (2) the pattern of change that's occurred; (3) the current surrounding zoning pattern; (4) the surrounding land uses, and (5) the setting they have and a description of what is being proposed.

(1) Historical master plan recommendations: in the 1970 Master Plan, the subject property was recommended for residential, multi-family high-rise zoning, with 43 units to the acre. However, this was not implemented, thus the subject property remained R-60. *Id.* at 54. In a 1976 amendment, the subject property was still recommended for multi-family zoning, but that also was

not implemented. The 1994 plan recommended continuing R-60 zoning for the site for two reasons: a higher density on the church site would be difficult due to the cost of structured parking, plus R-60 zoning would preserve some affordable single family homes. In fact, many homes near the subject property have been upgraded, and the neighborhood is not affordable. *Tr.* June 2 at 58-60. In the current Sector Plan the area is designated for PD-44, a similar density to the earlier multi-family recommendations.

(2) The pattern of change: The area has changed since the 1950's from a suburban area with a low level of development to a city living area with easy access to about 60 shops and 60 restaurants within a few blocks.

(3) Current surrounding zoning pattern: Small pockets of R-60 zoning are surrounded by multi-family housing, high-rise, and mid-rise zoning, with zoning that allows for 43 to 80 units per acre, and building height limits from 60 to 150 feet. *Id.* at 63.

(4) Surrounding land uses: Currently there are two to 11 story commercial use buildings, including a seven story parking garage, and a nine story residential building with retail on the first floor that has been approved on Auburn Street. There are single family residences along Glenbrook Road that back up to this approved development. The Rugby Avenue side of the subject property abuts a rescue squad building surrounded by surface parking. Mr. Perrine concludes that the area currently has a small enclave of single family residences along Glenbrook and Rugby, along with multi-family housing and the CBD, noting that the entire enclave is proposed for PD-44. There is more single-family housing along Old Georgetown Road, which is adjacent to the CBD. *Id.* at 67 - 70.

(5) Setting and proposal: Mr. Perrine described the urban setting around the subject property and adjacent residential enclave as the main amenities for these homes, more so than their backyards. In this setting he agrees with Planning Board Chairman Hanson that compatibility relies on the quality of design versus distance, together with below grade parking versus surface parking to mitigate visual, noise and activity impacts, relying on more attractive landscapes and

screening walls, rather than having to utilize greater set-backs. Mr. Perrine further accentuates the beauty of the architecture, identifying quality materials, finishes and inviting windows along with a loading dock that was relocated to be further away from residences and screening walls being used for privacy. Mr. Perrine indicated that the Council's intent in the Sector Plan was to encourage housing and to maintain the unity of the remaining single family homes. The Council designated block 19 as PD-44, with basic parameters of compatibility for providing multi-family housing in close proximity to single family homes. *Id.* at 70-71.

Although block 19 is currently not fully utilized as PD-44, it has been recommended as appropriate for PD-44 use entirely. Mr. Perrine argues that what is proposed for the subject property does meet all the requirements of the Sector Plan and would be compatible with its surroundings. Further, Mr. Perrine points out that the development would retain a church in a CBD, and allow for community services and recreation programs plus 17 affordable housing units. This, he noted, is almost as many as the Council thought to preserve back in the 1994 Plan. He argued that reducing the building height would reduce space for church programs or for affordable housing *Id.* at 71.

When the Hearing Examiner asked Mr. Perrine how the Council should evaluate compatibility, given that the design elements are illustrative at the zoning stage, he suggested that the Council rely on the two-stage approval process established in the Zoning Ordinance, which requires the Planning Board to ensure compatibility at site plan. *Id.* at 71-73.

Mr. Perrine discussed the purpose clause for the PD Zone, which begins with implementation of the Sector Plan. He argued that the subject proposal is in compliance with the Sector Plan, and that PD-44 zoning allows better integration of the uses than under conventional zoning with separate setbacks. He reiterated that the plan satisfies the Sector Plan's height restrictions and basic goals, the multi-family housing does not isolate the single family housing and the project provides for the retention of the church and community center, which are all integrated with the below ground parking. Mr. Perrine stated that the church and community center provide

for a maximum of social and community interaction and programs are accessible for all area residents and workers, not just for church goers. *Id.* at 75. He described the prominence of the church as providing a distinct visual identity, along with the architecture of the buildings framing the church. Mr. Perrine stated that the multi-family housing is consistent with the purpose clause because it provides for both market and MPDU units to balance nearby commercial facilities. *Id.* at 75. He discussed the use of green space, and to achieve that the surface parking was dropped below surface, making for useful open space, more appropriately located. There will be a green roof that will provide more open space, and pedestrian walkways that link the open space areas. *Id.* at 76-77. He stated that automobile traffic will be minimized because there is a Metro station some 2500 feet away and a circulator bus is about one block away. *Id.* at 77.

Mr. Perrine noted that the purpose clause encourages large scale development and the subject property meets this requirement by assembling several lots and creating a comprehensive development of church, community building and mixed use residential properties. He states this is an efficient use of land, with 107 residential units, more than the minimum of 50 that the PD Zone calls for. *Id.* at 77. Mr. Perrine states that without this integration of church, community building and residential units, there would be a significant loss of programs and services which are amenities for the entire area. Further he described the subject proposal as safe and convenient, not only for its future residents, but for the local area residents as well. *Id.* at 78-79. He noted that the project includes separate pedestrian walkways and connections to nearby roads.

Mr. Perrine turned to the Zoning Ordinance, the standards for the PD Zone, and explained how the proposed development satisfies each one. He noted that the plan calls for more than 50 units, and meets density requirements. Mr. Perrine opined that the PD Zone's setback requirements do not apply to the subject property because it is in close proximity to a CBD.

Mr. Perrine opined that the impact on public facilities, schools, parks and recreation facilities will be minimal, and the subject development will enhance the area. There will be minimal impact on the local elementary, middle and high schools, as indicated by Montgomery County

Public Schools. *Id.* at 82. Battery Lane Park is only one block from the subject property, and recreational facilities will also be located inside the residential building. *Id.* at 82.

Mr. Kaufman asked Mr. Perrine if any of the changes to the Development Plan have changed his analysis with regard to the appropriateness of the project. Mr. Perrine answered no. He opined that the greater set-backs and repositioning of the loading area created a greater degree of compatibility for the proposed development. *Id.* at 83.

Mr. Perrine opined that the subject property satisfies the requirements of the purpose clause and development standards of PD-44; that the subject property is compatible with existing and planned land uses in the surrounding area; the PD-44 classification would be adequately served by public facilities, schools, parks and recreation; there would be no adverse effects upon health, safety, security, morals or the general welfare of the surrounding area; and there would be no detriment to peaceful enjoyment, value or development in the surrounding area. *Id.* at 83-85.

Mr. Brown began his cross examination of Mr. Perrine regarding the number and placement of trees on the subject property. Mr. Perrine agreed that the purpose clause calls for minimizing grading to make the best use of trees. In Mr. Perrine's view, however, there are not many trees to save here. Mr. Perrine stated that there are seven specimen trees that will be taken out and only two are in good condition. He notes that this is evident on the submitted conservation plan. *Id.* at 87-89

Mr. Perrine acknowledged that the property on Auburn Street where a nine-story building has been approved is the CBD Zone, a different zone from the subject property. *Id.* at 90.

Mr. Perrine explained that during a Planning Board meeting, the set-backs to the buildings next to the Wash property were changed from 8 to 15 feet to make the proposed buildings more compatible. *Id.* at 91-92. Mr. Brown suggested that if the building could be set-back 15 feet from 8 feet, then why not lower the building from 8 stories to 6 stories to make it more compatible. Mr. Perrine argued that it's not only height, but the entire project is a 'whole package,' including church activities and MPDUs, and that one aspect can not be singled out. *Id.* at 91 – 94.

Regarding the recommendations of the Sector Plan for building height and distance, Mr. Perrine stated that on Old Georgetown Road buildings can not be higher than 50 feet for a distance of 60 feet from the road. The new church community center will not be in compliance, as it is 76 feet in height at 52 feet from the road, and a portion will protrude 8 feet into the 60 foot restricted area. Mr. Perrine opined that this is acceptable given that the building will only be five stories tall, and would be well situated with respect to the church. See *id.* at 105-107. Mr. Perrine acknowledged that an area 8 feet high and 26 feet wide would cut into the setback area. He maintained that the 60-foot area in which the Sector Plan called for a 50 foot height limit should be measured from the curb, not the right-of-way, because the curb line is consistent along Old Georgetown Road, while the right-of-way line varies. See *id.* at 109-112.

Under questioning by a community member, Mr. Perrine opined that the interior courtyard/playground qualifies as green area because it is not so small as to not be valuable, and it is designed to be a courtyard, surrounded by buildings but accessible for people in the buildings. See *id.* at 123-124.

Mr. Perrine opined that the Old Georgetown entrance to the church and community building satisfy the Sector Plan's call for street-activating uses. (Mr. Humphrey argues that the 1994 plan's urban form section was not amended by the 2006 Woodmont Triangle Amendment.). See *id.* at 126-127.

Turning to the recommendation in the 1994 Sector Plan for building heights decreasing towards the residential edges of the Sector Plan area, Mr. Perrine acknowledged that the subject site is part of the residential edge, but opined that the proposed height would be compatible. He noted that nearby Battery Lane contains buildings up to 10 stories high that are outside the CBD. *Id.* at 128-29. He argued that compatibility depends on more than height, stressing the importance of articulated building walls and façade treatments to create a gradual transition. *Id.* at 130.

On re-direct, Mr. Perrine stated that there are other high rise buildings near single family homes, citing Local Map Amendment Case No. G-763, approved in October of 1998. Case No. G-

763 was in the CBD and is located adjacent to single family homes on the south side of Montgomery Lane. See *id.* at 135-136. Mr. Perrine made the point that this 10-story building is only 50 feet away from a single family home. There was also a nine story residential building recently approved by the homes on Glenbrook Road, just inside the CBD. See *id.* at 137-138.

Mr. Perrine stated that Technical Staff requested a right-of-way expansion to increase the size of the sidewalk, so that there would be continuity from the CBD area onto the subject property. This would make the sidewalk 15 feet wide versus the 6 foot width that is currently in place. This would change the right-of-way line, but not the curb line. *Id.* at 142-144.

Describing a single family home that is currently for sale, Mr. Perrine emphasized the neighborhood has had significant teardowns, renovations and expansions of existing homes. The home pointed out is listed for over \$1.2 million and advertises that it is in walking distance to the Bethesda Metro, shops, restaurants, Starbucks, the Trolley, etc. *Id.* at 144-145. This house is located next to the Wash house on Rugby Avenue. Mr. Perrine defined the differences between rural, suburban and city living, emphasizing compatibility for each setting: in a rural setting compatibility might rely on distance, in a suburban setting it might rely on a row of pine trees, and in an urban setting, it would rely more on a screen wall, a fence, design of the facility and putting some activities indoors. Mr. Perrine offers a comparison of the house for sale to the relatively modest single family homes that had been prevalent in the area. The house for sale is more representative of what the area has developed into, and not in the range of what is affordable by the median income earner. Mr. Perrine opines that the cost of this home for sale is due mainly to its renovations, location and convenience. *Id.* at 145-147.

In response to additional questions from Mr. Humphrey, Mr. Perrine acknowledged that the high rise he mentioned on Montgomery Lane next to a single-family home, known as the Edgemoor Condominiums, is also adjacent to another high rise, and is in an area that the 1994 Sector Plan recommended for a minimum density of 45 dwelling units per acre, with a maximum density of 100 units per acre and maximum height of 65 feet. *Id.* at 150-51. Mr Perrine agreed

that the plan anticipates high densities in the area of the Edgemoor Condominiums. He disagreed, however, with the proposition that the TS-R Zone and the PD-44 Zone are very different zoning categories, describing their densities as “not dissimilar,” and noting that both have compatibility requirements.

The Hearing Examiner asked Mr. Perrine to elaborate on a why the community center building is only 52 feet set-back from the curb, instead of 60 feet, per the Sector Plan. Mr. Perrine emphasized that the size of the building was designed to fit a junior varsity basketball court, and that the setbacks were designed to be in line with setbacks for other buildings and building faces that were already created, which included features of the church and the breezeway between the church and the community center. *Id.* at 155-156.

Mr. Perrine reviewed building heights along nearby streets, finding buildings with three to ten stories along Battery Lane; two, four and eight stories along Rugby Avenue; three, six, seven, ten and 14 stories as you get closer to Woodmont Avenue. See Tr. Sept. 24 at 14. He noted that south of Old Georgetown Road, is the Battery Park residential neighborhood, where buildings are much smaller, generally one and a half or two stories. He considers the five lanes of Old Georgetown Road to be a demarcation between the more urban Woodmont Triangle area and the residential Battery Park neighborhood. See *id.* at 15. Going back to the north side of Old Georgetown Road, Mr. Perrine noted that the smaller buildings are mostly older, and all of the buildings that he identified as approved but not yet built are taller. He considers this consistent with the Sector Plan, which relaxed height limits as one means of encouraging more housing in the area. See *id.* at 16. Mr. Perrine expects that buildings of greater height will continue to be approved in the Woodmont Triangle area. See *id.* at 18.

In response to questions from a community member, Mr. Perrine acknowledged that the 11-story building across Glenbrook Road was in the Old Georgetown Road Corridor District in the 1994 Sector Plan, whereas the subject property was in the Woodmont Triangle District. See *id.* at 25-25. He noted that the 11-story building was within the area covered by the 2006 Sector Plan

amendment. He also acknowledged that the taller buildings he identified north of Old Georgetown Road were not in the Woodmont Triangle District in the 1994 Sector Plan. See *id.* at 25-26.

2. Edward Wallington, engineer. Tr. June 2, 2008 at 161-193.

Mr. Wallington was designated an expert witness in civil engineering. He personally supervised work on the subject property, and has knowledge of the site, the surrounding area and the development standards requirements for the Zone. See Tr. June 2 at 161-162.

Mr. Wallington described the NRI/FSD, or Natural Resources Inventory and Forest Stand Delineation, which shows that the property has no forest, stream buffer, flood plain, conservation easement, or any type of natural features that would require specific setbacks. There are some specimen trees, but many are in poor condition and would not do well with a high density development. *Id.* at 164. Mr. Wallington stated that he and Technical Staff agreed that it would be better to remove the existing trees and plant new ones. See *id.* at 164-65. The Hearing Examiner notes that two trees had to be cut down during the pendency of this case due poor health.

Mr. Wallington used the forest conservation plan to demonstrate that forest conservation requirements would be met. He stated that because the subject property is already developed and has no forest, the only requirement is afforestation, which will be met on site. See *id.* at 166.

Mr. Wallington detailed the storm water management plan, noting that a concept plan was approved by the Department of Permitting Services. The plan consists of three sand filters that would collect runoff from vehicular and grassy areas, filter it and disperse it for eventual release into the storm drain system. Mr. Wallington observed that the green roof would assist in reducing the rate of storm water runoff by allowing the water to collect under the turf of the green roof, where it would be collard and filtered and eventually drain. See *id.* at 169. Because the runoff would be dispersed to different discharge points, each with a peak discharge under 2 CFS (cubic feet per second) no channel protection (quantity control) measures would be required. See *id.* at 170-171.

Mr. Wallington described the road abandonments Applicants have requested: 4,043 square feet for the Rugby Avenue piece and 1,300 square feet for the Glenbrook alley piece. See *id.* at

171. There is no indication of any public right-of-way that connects the proposed abandonment areas, which Mr. Wallington stated serve only the subject property. See *id.* at 172. He noted that the abandonments would require some adjustment to the sewer, water and power lines on the subject property, but will not affect any other property, except for a couple of hours of outage while being worked on. Mr. Wallington continued by stating that fire department access would be from the Rugby Avenue entrance, around the building to Old Georgetown Road. He stated that there would be signage and landscaping to indicate emergency vehicle use only, but the plans were changed later. See *id.* at 175-176; Lenhart testimony Sept. 9.

Mr. Wallington opined that the new cul-de-sac at the end of Rugby Avenue would provide a turn-around area for medium sized trucks, which currently they have to back out or use the church parking lot to turn around. Larger trucks would use the loading dock off of Glenbrook Road. Mr. Wallington suggested that the turnaround area o Rugby would benefit Rugby Avenue homes as well as the subject site. See *id.* at 177-179.

Mr. Wallington noted that adequate water and sewer services are available on Rugby, Old Georgetown and Glenbrook. See *id.* at 180.

Mr. Wallington opined that from a civil engineering standpoint, the proposed rezoning would serve the public interest, would be suitable for the subject property, would be compatible with the surrounding neighborhood, and would not cause adverse effects upon the health, safety, security, moral or general welfare of the general public. See *id.* at 181.

On cross-examination, Mr. Wallington stressed that green roofs are a significant priority throughout Montgomery County. He stated the concept of the green roof is a grassed turf condition with approximately 4-5 inches of soil underneath. *Id.* at 181-182. It can be for walking on, but is not intended for recreational use, as the primary function is to hold, filter then drain storm water off the roof over a period of time, unlike current conventional roofs that dispense the storm water immediately. It would be soggy after rain or snow melt. *Id.* at 182. It is intended, Mr. Wallington explained, more for visual enjoyment and environmental benefits than for walking.

Mr. Wallington deferred specific questions about the site acreage to his surveyor, who testified at a later date.

3. Michael Foster, architect. Tr. June 2 at 194-243; Tr. June 6 at 55-128.

Mr. Foster was designated an expert witness in architecture and urban planning. He completed an architectural analysis and feasibility study for the proposed rezoning, taking into account the provisions of the Sector Plan and the PD-44 Zone. Mr. Foster is very familiar with the subject property, its application for re-zoning and the surrounding areas. See Tr. June 2 at 194-197.

Mr. Foster described the existing church as a mid- 20th century building that has been a landmark for some time for people coming in and out of the CBD. As a result, he stated, the plans leave a little bit of open space on both sides to set the church building apart a little bit. On one side that space is open to the street, providing pedestrian access to the building from Old Georgetown Road, and on the other side it is an enclosed courtyard intended for use by the child daycare center. Mr. Foster considers the site ideally located to take advantage of the transit-oriented and pedestrian friendly network of streets, neighborhoods, shops and restaurants that have developed in that part of Bethesda. Mr. Foster stated that the site is adjacent to an 11-story office building and more broadly surrounding by high-rise or higher-density residential structures. He also acknowledged that immediately to the north is “a marvelous pocket of single family residential neighbors,” stating that these buildings, together with the scale of houses across the street and the site location within walking distance to Metro and other community amenities, “certainly influenced the design decisions that have shaped this project.” Tr. June 2 at 200.

Mr. Foster displayed some confusion about the role of setbacks in this case. He stated that the proposed project would satisfy all required setbacks. When the Hearing Examiner pointed out that the PD Zone does not impose any setback requirements,⁸ Mr. Foster stated that the setbacks

⁸ With the exception of a 100-foot setback that does not apply in close proximity to a CBD.

they worked with must have been the ones that apply under the current zoning. See Tr. June 2 at 201.

Mr. Foster noted the Sector Plan recommendation that no building should be taller than 50 feet within 60 feet of Old Georgetown Road, which he believes should be measured from the curb line. See *id.* at 201. He noted that the existing church satisfies that recommendation and its location would not change, but the community center building would be only 52 feet from the curb, rather than 60, at a point 50 feet above grade. He maintained that this intrusion into the recommended setback is necessary to provide enough space for a regulation-size intramural basketball court. See *id.* at 202.

Mr. Foster testified that the lay out was designed in a classical plan, with the church as the centerpiece, the community building on one side and the residential building on the other. He stated that the proposed residential building was shaped to minimize its mass along Old Georgetown Road, and was divided into two parts facing Rugby Avenue to break down its scale. He noted that entry courtyards on both the Rugby Avenue and Old Georgetown Road sides of the building would provide some visual relief and entry space on two sides of the building. Mr. Foster declared that although the church represents a miniscule percentage of the total square footage proposed for site, it is intended it to maintain a dominant aesthetic role, so his team used the cornice line of the church as a two-story base for the other buildings, repeating some of the architectural materials and treatments used on the church in those first two stories, then set the new buildings back above that point. In later testimony, Mr. Foster discussed an illustrative cross-section that shows the existing sanctuary, the preschool underneath it, with the adjoining daycare entry way connected to the courtyard and the day care center on the first floor of the new community center building. See Tr. June 6 at 62; Ex. 306. In the community building, the second floor would connect into the church and consist of church offices and a library. The third floor would contain non-profit offices, and the fourth floor the multi-purpose room, housing the regulation basketball court, bathrooms, lockers, changing areas, a kitchenette for events and a spectator

mezzanine. See *id.* at 62. Mr. Foster explained that the size of the gymnasium was established by the regulations for a junior high school basketball court, which is the minimum standard followed by the Fellowship of Christian Athletes, a community league. See *id.* at 71.

Mr. Foster testified that the residential building would have garage access with 196 spaces reserved for residents, and additional 62 for church and community building use. See Tr. June 6 at 63-64. In addition, the plans show two convenience spaces at grade for the residents, accessed from Rugby Avenue, and one drop off/convenience space in front of the community building, along Glenbrook Road. See *id.* at 63-64.

Mr. Foster noted that the proposed development would exceed the PD-Zone requirement for 50 percent of the site to be “green area” and reviewed in some detail a green area exhibit that was amended several times during the course of the hearing. He explained that the roof of the residential building would have green area in the form of a vegetative green roof that would contribute to storm water management, as well reducing the heat island effect of the building and providing attractive ground cover areas. The roof of the residential building would also have green area in the form of a lap pool, walkways, a cook-out pit, and two other open, community-governed areas for gatherings, all of which would be open to building residents. See Tr. June 2 at 206-07; Tr. June 6 at 75-76.

Mr. Foster described green area on the ground, consisting of two front courtyards, a back courtyard, walkways and landscaped setback areas along the site perimeter and near building entrances, and the day care center courtyard/playground. See *id.* at 215; Tr. June 6 at 78-79.

In later testimony explaining revisions to the green area exhibit, Mr. Foster testified that green area was calculated using the gross lot area of 87,417 square feet, which includes the two roadway areas that are the subjects of the Applicants’ abandonment requests, as well as the area of future dedication proposed along Old Georgetown Road. See Tr. June 6 at 72. Mr. Foster testified that he has had in-depth discussions with Technical Staff about the various green area components on the proposed Development Plan and their consistency with the green area

definition. He acknowledged that the pool is intended for building residents and the courtyard/playground is intended for the day care center, and as such cannot be open to the public. Mr. Foster testified that in Technical Staff's view, these features qualify as green area. See Tr. June 6 at 79-80. On cross-examination, Mr. Foster conceded that the Zoning Ordinance definition does not limit the percentage of green area that may be located on a roof, so theoretically all of the green area could be on a roof. See *id.* at 85. He stated that in general, setback and building coverage requirements result in some green area necessarily being on the ground. Mr. Foster opined that while one could theoretically create a design that intentionally puts all the green area on the roof that is not typically how a reasonable architect designs a building and it certainly was not done that way in this case. See Tr. June 6 at 91-95.

Mr. Foster noted that the dominant ingress and egress for the residential building is off Old Georgetown Road and for the community/education building it would be off Glenbrook Road. See Tr. June 2 at 210-211. The garage would normally have two-way traffic, so that cars can access either Glenbrook or the driveway to Old Georgetown. During peak hours for drop-off/pick-up at the child day care center, however, garage traffic would flow one way, from west to east, obligating drivers to enter from Old Georgetown and exit on Glenbrook. See *id.* at 211, 221. Mr. Foster stated that parents would be expected to drive through the garage to a drop-off/pick-up point adjacent to the courtyard, and to remain in their cars while staff members help children in and out. He explained that the courtyard would be sunken below grade so that it can be accessed from the underground garage, noting that the underground approach to the day care center would allow cars to line up without adversely impacting the community by creating lines of cars in the street. See *id.* at 220.

Mr. Foster opined that the subject property is compatible with the residential areas along Rugby and Glenbrook. He noted that the Applicants propose to plant a vegetative screen along the north and east sides of the residential building, adjacent to the backs and sides of the closest single-family homes. See Tr. June 2 at 222-23. Mr. Foster reviewed the setbacks proposed

between the closest homes and the proposed building, noting that the setback from the Wash residence, the closest home on Rugby Avenue, was increased from eight feet to 15 (and ultimately to 28 feet after Mr. Foster's initial testimony), based on concerns voiced by the Planning Board and neighbors. He stated that the increase in setback would reduce the noise coming from the subject property and make room for more landscaping to decrease visibility and noise. *See id.* at 216-217. He observed that the loading dock, which was originally planned for an above-ground location near the Glenbrook Road entrance to the garage, was moved inside the garage to reduce impacts on the neighbors, due to concerns raised by the community and Technical Staff. *See id.* at 217.

Mr. Foster stressed that the subject site is directly across the street from an 11-story office building. He noted that the proposed development would include widening the sidewalk along Old Georgetown Road from about six feet to 15 feet from the length of the property's frontage, installing streetscape treatments consistent with CBD standards and cleaning up the vegetation. He opined that these changes would create a better pedestrian experience and a more compatible use, considering the density and design character that are desired at this location. *See id.* at 227. Mr. Foster observed that the plans show an entrance to the site in front of the church with a double staircase, which "really engages the street." *See id.* at 233. From the top of the stairs, people would be able to turn right for the church/community center entry or left into the garden leading to the front entrance of the residential building.

Turning to the homes across Old Georgetown Road, Mr. Foster noted that the building proposed on the subject site would have greater setbacks and front yard areas than the neighboring houses, and a front setback twice as deep as the 11-story office building across Glenbrook Road. He maintained that while the buildings across Old Georgetown are residential in appearance, half of them have commercial signs. *See id.* at 228. This statement contradicted Mr. Perrine's earlier testimony that the structures across the street are used as residences, and testimony by Opposition land planner Kenneth Doggett that there are no commercial signs among the buildings across from the site. Moreover, it was hotly contested by the president of the Battery

Park Citizens Association, who testified that commercial signage is prohibited. See testimony of Sara Gilbertson.

Mr. Foster elaborated on the proposed setbacks, stating that from the face of the curb to the base of the residential building, the distance would be 43.5 feet, which would match the setback of 43.5 feet from the center of the existing church building. See Tr. June 6 at 69. He noted that the building would remain within the Sector Plan's recommended 50-foot height limit for the first 60 feet from Old Georgetown Road, measuring from the curb. See *id.* at 69-70. The taller stories would be set back farther from the street, with the building façade stepping back an additional eight feet above the second and fifth stories. See Tr. June 2 at 226-27. The proposed community center building would also be set back approximately 43.5 feet from the face of curb at its base. See Tr. June 6 at 71.

Mr. Foster described 'shadow' studies showing shadows the proposed buildings would cast on the neighboring properties at three different times of the year, on March 21st, June 21st and December 21,st at three times of day. Mr. Foster testified that the greatest shadow impact would be in the afternoons on all three days, when shadows would extend to the north, onto the nearest residential properties on both Rugby and Glenbrook. See Tr. June 2 at 235-36. During the winter months, when shadows are longest, Mr. Foster noted that the Estreicher home (closest to the site on Glenbrook) is already shadowed by the 11 story office building across Glenbrook. See *id.* at 237. By 3 in the afternoon during the winter, the buildings proposed on the subject site would cast shadows to the north and northeast, onto the residential buildings. Mr. Foster noted that because the sun keeps moving, it does not hold any one shadow pattern for more than two hours, so any shadow impact would not last for more than about two hours. See *id.* at 238.

Mr. Foster offered his professional opinion, as an architect and urban designer, that the proposed re-zoning of the subject property to PD-44 is suitable, and that the proposed development would be an asset to the surrounding neighborhood. In his view, this neighborhood presents a wonderful opportunity for pedestrian-friendly smart growth, making the subject site a

perfect location for additional housing density. He suggested that taking a surface parking lot and turning it into a more aesthetic, manicured, well detailed site would enhance the adjacent single-family neighborhood, and further opined that the proposed project would have no detrimental impact on the peaceful enjoyment, value or development of surrounding properties, or on the health, safety, security, morals or general welfare of the residents. See *id.* at 239-240.

Under cross-examination, Mr. Foster read into the record the fifth of eight urban form principles listed on page 40 of the 1994 Sector Plan: "Treat rooftops as sculptural elements that contribute to the visual interest of the skyline. Where appropriate, consider rooftops as usable outdoor space for recreational or commercial purposes."⁹ Tr. June 6 at 96. He argued that the proposed development would promote the second sentence of that guideline by creating outdoor recreational space on the flat roof of the residential building. Mr. Foster maintained that the proposed development would be consistent with the first sentence of the guidelines because the composition of the buildings was "very intentionally designed to break down the scale of what is a massive CBD building" and to create visual interest. *Id.* at 96. He observed that visual interest would come from the streetscape, as well as from the sloped roofs that tie in with the church architectural form, and the three vertical elements that draw on the church steeple, stepping back to a flat roof for recreational purposes and, "to help that meet the sky," a vaulted roof on the community center building. See *id.* at 96-97. Under further cross-examination, Mr. Foster acknowledged that the church steeple would be less visible, with the new buildings in place, from any angle other than Old Georgetown Road.

Mr. Brown asked Mr. Foster to confirm certain calculations that Mr. Brown made, which were based on Mr. Brown's argument that the figure the Applicants have used for the gross tract area of the subject site should be increased by 7,750 square feet, to add back in a strip of land running through the middle of Old Georgetown Road; Mr. Brown contends that while this strip of land is part of Old Georgetown Road, the church was not paid for this land, therefore it should be

⁹ The quote has been shown correctly, rather than as misquoted in the transcript.

considered part of the gross tract area. See Tr. June 6 at 100-107. Mr. Foster did not concede that this square footage should be included in the gross tract area. He agreed, however, that using Mr. Brown's larger gross tract area would require more green area to satisfy the 50 percent requirement, making the rooftop green area more critical. See *id.* at 108. Using the Applicant's number for gross tract area, 53 percent of the proposed rooftop green area would be necessary for the site to satisfy the 50 percent requirement, and the full amount of green area proposed would equal 57 percent of the land area of the site. Using Mr. Brown's number for gross tract area, 81 percent of the proposed rooftop green area would be necessary for the site to satisfy the 50 percent requirement, and the full amount of green area proposed would equal 52 percent of the land area of the site. See *id.*

On further cross-examination, Mr. Foster explained why the green area exhibit shows a front setback for the church of 43.5 feet, while Mr. Dye testified that the church's front setback as shown on the ALTA survey is 36.7 feet. See Tr. June 6 at 109. He agreed that front lot lines are defined by property lines, which do not change just because the curb lines for a street change. See *id.* at 113. Mr. Foster acknowledged that setbacks "for legal purposes" must satisfy the Zoning Ordinance, which measures setbacks from the property line, which is the same as the right-of-way line. See *id.* at 114. He stated that for planning purposes, including master plans, a setback from a road can be measured from the curb line, rather than the right-of-way line. See *id.* at 115-116.

Cross-examination then turned to the layout of the underground garage. Mr. Foster stated that he was involved in a collaborative design effort for the garage. To explain how the loading dock would work, Mr. Foster stated that a truck would enter from Glenbrook Road and back into the loading area, following a scheduled that would reserve this area for day care center use during peak drop-off/pick-up hours. See Tr. June 6 at 171. When the loading dock is being used, for instance for trash pick-up, access to the garage would be limited to the driveway off of Old Georgetown Road. See *id.* Mr. Foster observed that for a residential building of the size proposed

here, there would typically be only one garage entrance. Two entrances are proposed here, partly to allow an interior drive-through for day care customers. See *id.* at 171-72. Mr. Foster noted that the residential spaces would be at the west end of the garage and the church spaces at the east end, so only the church spaces would be inconvenienced by the day care center queue. Mr. Foster does not expect the day care center queue to extend back far enough to block the turn off from the entrance into the residential parking. He assumes that parents of very young children will park in church parking spaces and bring their children in, despite the fact that they may not have room to back out of a parking space until the queue has dissipated. See *id.* at 174, 181. Mr. Foster estimated that the peak period with cars stacked up in line for the day care center would be 15 to 20 minutes long in the morning and 15 to 25 minutes in the afternoon. See *id.* at 184-85. He suggested that people who come to the church regularly will learn not to arrive or leave during those periods.

Mr. Foster noted that there is room for about 12 cars to stack up waiting for drop-off/pick-up before spilling out into the Old Georgetown Road driveway, and eight or nine before the residential parking would be blocked. See *id.* at 194. He considers that to be more than twice the space necessary, based on a rule of thumb that calls for enough space to stack five cars for a day care center. See *id.* at 173-75. Mr. Foster suggested that the 62 church spaces represent almost twice the number of parking spaces required by the Zoning Ordinance for the day care center, so half of those spaces should be considered available for church or community center users.

Mr. Foster acknowledged that the 62 spaces proposed for the church are essentially the same number of spaces the church has now. He indicated that based on information from the church, the existing parking spaces are not frequently full, and if more parking were necessary, there are public parking garages nearby. He noted that community center activities and church activities can be designed not to conflict, and that most of those activities would not have the peak attendance of Sunday services that is the basis for the code requirement for church parking, which would be satisfied under this plan.

Under questioning from a community member Mr. Foster stated that the basketball court is planned with a seating area where chairs could be set up for 150 to 200 spectators. See *id.* at 195. In response to a question about whether townhouses had been considered for the site, instead of multi-family housing, Mr. Foster testified that replacing the existing parking spaces required an underground garage, and townhouses typically do not have public or non-residential parking underneath, so it was not a practical model to consider. See *id.* at 197. He estimated that the total building square footage under the plan would allocate about 14,000 square feet to the church, the community center and the breezeway, and about 22,000 square feet to the residential.

On re-direct, Mr. Foster gave his interpretation of the reference on page 12 of the Staff Report to measuring the 60-foot setback area from the Old Georgetown Road right-of-way. See *id.* at 208-209. He stated that based on the words and discussions with Staff, he believes that right-of-way meant the edge of the road. He recalls discussions about the road width not changing, and the fact that the tall office building across Glenbrook Road from the site is set back 14 feet from the face of curb. See *id.* at 210. Mr. Foster does not consider it inconsistent or unusual to use the term “right-of-way” when you mean “face of curb.” See *id.* at 211-212.

When asked whether he felt that the tall building across Glenbrook is something he needed to integrate into his design, or something to ignore and design around, Mr. Foster stated that the architecture of that building is not to his tastes, but it is part of the urban context, and some buildings are better than others. See *id.* at 222.

On further re-direct, Mr. Foster testified that if the community center building were pulled back on the site to comply with the Sector Plan’s 50-foot height limit within 60 feet of the road, there would be a negative effect on the aesthetics of the building. See *id.* at 215-217. He stated that the bay window would “share some of the vertical rhythm going in and out” and pulling the building back would “lose this presence in the foreground” that is designed to provide proportionally similar basis for the three buildings. *Id.* at 216.

Mr. Foster clarified that Applicants do not intend for pedestrians to walk through the lobby of the new residential building to get from Rugby Avenue to Old Georgetown Road, but it would be possible for them to walk along the driveway at the west edge of the site. See *id.* at 220. There would not be a marked pedestrian path, but Mr. Foster expects the traffic count on that driveway to be low. See *id.* He considers this an improvement over the current situation, where pedestrians cross through the parking lot and by dumpsters.

4. Kenneth Dye, property line surveyor. Tr. June 6 at 12–54.

Mr. Dye, a licensed property line surveyor for 18 years, was designated an expert in property line surveying. He is personally familiar with the property in question and prepared the Identification Plat, Exhibit 8. Mr. Dye stated that the Identification Plat was based on an ALTA survey, which presents a boundary of the subject property based on land records, sending field crews out to locate all property corners and locate all buildings on site and then making a determination of where the property is actually situated. See Tr. June 6, 2008 at 16-17.

When there are discrepancies regarding property lines, a hierarchy of criteria is used to best determine property line. First, physical monumentation is used to clarify discrepancies. This is the use of physical and artificial monuments. Then bearings, angles, distance, and area are used to best ascertain the correct property lines. Mr. Dye states that this is the industry standard. *Id.* at 19-20. Only evidence in accordance with the hierarchy that determines property lines is shown in the ALTA survey.

Mr. Dye's lot line calculations which relate to the accuracy of the Applicants' gross tract area calculation were compared to area tabulations, SDAT (tax assessor) key areas and deed records. The first comparison was made along the line between the subject property and the rescue squad property, which was highlighted as yellow on an Annotated ALTA survey, Exhibit 304. *Id.* at 21-22. The SDAT is based on the record plat or deed when recorded. However, Mr. Dye found an overlap of meets and bounds from the rescue squad property onto the subject property, on parcels 8 and 9. *Id.* at 22-23. He determined the correct property line by comparing

what was currently marked as an angle point, which showed a corner that appeared as an original corner on the original plat. *Id.* at 23-24. Therefore, Mr. Dye opined that he was very comfortable with the property line that he had marked on his ALTA survey and identification plat.

The next issue was the two foot reservation shown on parcels 7 and 8, on the original plat. This two foot reservation appears to be a spite strip, which the church obtained by deed. The longest line on the property is 150 feet, but the deed states 248 feet. *Id.* at 25-26. Mr. Dye identified on his annotated ALTA survey where he believes the true property line is. *Id.* at 24.

The green highlighted area of the Annotated ALTA survey showed the largest discrepancy, on parcels 5 and 6 which were the subject of a taking in July of 1938 for Old Georgetown Road, a state highway. *Id.* at 27. These takings were never deducted from the original deed or plat, nor reported in an instrument. *Id.* at 27. Mr. Dye went to the best evidence available to him, which was the 1959 or 1968 highway field notes, and placed the right of way as best he could. *Id.* at 28. Using the field notes he did an actual on-site survey and identified a prescriptive easement on parcel 6, explaining that the State Highway Administration takes the position that it owns land customarily used for a public road by prescriptive easement, and only has to pay for land it needs beyond that. *Id.* at 29. Mr. Dye opined that the property line on his ALTA survey and Identification Plat is correct. *Id.* at 29.

Mr. Dye continued with an overview of each plat and how he calculated the correct property line or square footage.

Upon cross examination regarding the setback measurement from the face of the church to Old Georgetown Road, Mr. Dye stated that the 36.7 feet from the base of the church is to the property line, not the street. *Id.* at 35. Mr. then acknowledged that measurement of the setback is usually done from the right-of-way to the house or building, unless otherwise directed. *Id.* at 37. The setback from the church to Glenbrook is 29.8 feet. Mr. Dye acknowledges that the property line and the right-of-way line are the same on the subject property. *Id.* at 38

Mr. Dye testified regarding the differences between the SDAT numbers and his on Parcels 5 and 6, which have to do with takings v. prescriptive easements. He acknowledged that approximately 7,750 square feet on parcels 5 and 6 were used for the road, but not formally taken by the SHA and opined that the Applicants were correct in excluding this square footage from the gross tract area. *Id.* at 49-50

5. Susan Kirk, Executive Director, Bethesda Cares. Tr. June 6 at 129–139.

Ms. Kirk has been the Executive Director of Bethesda Cares, a community outreach program for the homeless, for the past 12 years.

Bethesda Cares strongly supports the re-zoning application for the subject property, based on a strong association between the church and social service organization sharing space and providing services together to the community. *Id.* at 132. The services provided include: an eviction assistance program, helping the homeless regain stability. They have over 6,000 walk-in visits per year. Last year they helped 600 families stay in their homes, plus helping people find jobs and providing psychiatry services and a social worker to assist as needed. Lunch is served Monday – Friday from the 16th through the 31st of every month at the subject site, and the volunteers number about 450, with many coming from the church. They help serve lunch, make pies, and put together stuffed backpacks at Thanksgiving and street survival kits. *Id.* at 130-132.

Bethesda Cares would lose their lunch site for three years during construction of the proposed development, but they support the chance to build something long term, as a place where “community can happen.” *Id.* at 133. Ms. Kirk states with the proposed rezoning and developments, Bethesda Cares would be able to provide more day care, elder care and mental health care, and assist families in accessing the MPDU’s that will be built on the property. She adds that Bethesda Cares will then be able to have a greater impact upon the surrounding community. *Id.* at 133-134.

Under cross examination, Ms. Kirk specified that self-help services and office space would be expanded, including possibly having an office for their psychiatrist. Bethesda Cares has been

limited in the services they provide because of the lack of space. *Id.* at 135. Ms. Kirk states that the current facilities at the church are deteriorating, the kitchen is very small and there is a lack of security. With the new facility, the church and Bethesda Cares will be able to provide more lunches during the week, have newer and more office space, and be able to provide services to the community at a much higher level. *Id.* at 136-137. Ms. Kirk was very clear that the church has brought all the players to the table, meaning the nursery school, day care center, fellowship house and Bethesda Cares, so that they could brain storm on what facilities they would all like to see. This is how they came up with the gymnasium and the intent behind the gym was to make it a community center. Without the gym, she states, the intent would be severely impacted. *Id.* at 137-138. Ms. Kirk hopes that her homeless clients will be able to use the gym, but those details have not been determined.

6. Rebecca Wagner, Executive Director, Interfaith Works. Tr. June 6 at 139–151.

Ms. Wagner has been the Executive Director of Interfaith Works for the past 8 years, and a volunteer for 36 years. Interfaith Works is a coalition of 140 congregations working together to meet the needs of the poor by providing emergency shelter, day programs for homeless adults, homes for disabled adults, and other assistance. Ms. Wagner described the church on the subject site as a hub for the low income population in the Bethesda area, and part of a complex network of service organizations. See Tr. June 6, 2008 at 141-142

Ms. Wagner believes that Interfaith Works is part of a web of services that are provided throughout the County. When she heard of the possible re-zoning and the expansion of the Christ Lutheran property, she was hopeful that this would strengthen the neighborhood, and create a multi-generational complex. *Id.* at 143. She strongly supports the present re-zoning application. *Id.* at 144.

Ms. Wagner explained that if the re-zoning were approved, and the plans implemented, she would have a place to hold community meetings in Bethesda. *Id.* at 144. In addition, the

expansion would create a whole community out of a diverse neighborhood, including day care, senior care, serving the homeless, etc. *ID.* at 145.

One thing that Ms. Wagner cites as being crucial is that in re-zoning and then expanding the subject property, it will strengthen the community, and allow for meeting current and future needs. She says that right now, they have to turn people away. Ms. Wagner acknowledges that Christ Lutheran is reaching their limit in terms of functionality and that expansion would allow for continued growth. *Id.* at 146.

Under cross examination, Ms. Wagner states that from what she knows of the neighborhood, everyone in the community would benefit from the services that would be provided by Christ Lutheran. *Id.* at 148. She opines that something as simple as a firefighter or nurse who may qualify for one of the MPDU's and be able to live in the community, close to work, instead of driving from Frederick or Damascus is pretty powerful benefit. Also, surrounding neighbors being able to utilize the day care, or after school care programs, instead of children going home to empty houses. Or the expanded services to assist those in need. *Id.* at 148-149. Ms. Wagner further opines that the gymnasium is a key component for after school activities that can combine homework areas and physical activity for the children. Without certain parts of a community center, she opines, some people from the community won't feel invited. *Id.* at 150.

Upon further cross examination, Ms. Wagner stated that she is not aware whether neighborhood teenagers will be part of the mix of after school activities, nor how many firefighters would or would not move back into the county, given affordable housing options. *Id.* at 151.

7. Deborah Miness, Executive Director, Washington Smart Growth Alliance. Tr. June 6 at 152-163.

Ms. Miness is the Executive Director of the Washington Smart Growth Alliance (WSGA). The WSGA is a regional non-profit that includes business, environmental and civic organizations. Its mission is to research, identify and encourage land use and transportation practices that protect environmental assets and enhance the quality of life. *Id.* at 153.

In January of 2008, the WSGA jury recognized the subject property as a smart growth project. This is based on location, transportation access, density, design, diversity of use, affordable housing, community assets and participation. *Id.* at 153. The jury found that the project would benefit the community by allowing the church to continue providing services at its current location, reducing development pressure in outlying areas, and providing pedestrian friendly streetscape, a new community building with meeting room space, classrooms, a gymnasium, day care and theater space, and housing located close to public transportation. This, Ms. Miness stated, will reduce dependency on automobiles and contribute to the balance of jobs to housing. *Id.* at 154.

Ms. Miness noted that the environmental planning of this project, including storm water management, green building design and incorporating neighborhood input into the design, are additional benefits. *Id.* at 154-155.

Ms. Miness explained that proposals are usually submitted to the jury usually by the developer, who pays a \$1,500 fee, and are reviewed on a quarterly basis. *Id.* at 157. If the project meets the criteria then the project will get a WSGA jury recognition, unrelated to whether any other projects are so recognized. The project is evaluated only on what is submitted, without any input from the neighborhood. *Id.* at 157, 161-162.

The subject property would provide for increased, diverse use of the property, including housing, which would allow for a higher density and since it is close to public transportation and many other businesses, allow for the reduction of vehicle use. This would mean a potential reduction in urban sprawl. However, this does not mean that if there are residential units built on the property, that urban sprawl would not continue to happen. Ms. Miness acknowledges this, but reiterates that the WSGA promotes smart growth on the basis that more intense growth in urban areas will reduce the demand for growth in other areas. Ms. Miness opines that this project would benefit the entire community. *Id.* at 158.

8. Clark Wagner, Bozutto Homes, Inc. Tr. June 24 at 28-45.

Mr. Wagner is Vice President and Director of Development for Bozutto Homes, Inc. He is the project developer for the subject property, handling land acquisition, assembling a design team, pursuing entitlements, obtaining financing and developing the construction documents. He is intimately familiar with the subject property and application for re-zoning. See Tr. June 24 at 29, 31.

Bozutto Homes was selected by the church to develop the condominium portion of the subject property project. Bozutto Homes then formed BA Old Georgetown Road LLC (BAOG), entering into a joint venture agreement with the church in order to eventually purchase a condominium parcel from the church, then develop and build the condominiums once the project was cleared to move forward. *Id.* at 29-31. Bozutto Homes/BAOG will also be the general contractor for the church portion of the development, if it goes forward.

Mr. Wagner testified that Bozutto submitted an application to the Smart Growth Alliance. He explained that the Smart Growth Alliance recognition is a very lengthy complex process. *Id.* at 31. Mr. Wagner emphasized that there are many applicants but few recognized as a Smart Growth project. Therefore they were very happy to have the subject property recognized as a Smart Growth project. *Id.* at 32.

Once the project receives final approval, the 107 condominiums, underground parking, church renovations and community building will take approximately 24 months to complete. Mr. Wagner specified that they would start with some building demolition and utility installation, then move to building the parking garage, followed by building the condominiums and church renovations. *Id.* at 32-33. He explained that he had not personally been involved with neighborhood meetings regarding the project, but a Bozutto representative had been at every neighborhood meeting. *Id.* at 33-34.

Once the project is complete, BAOG and the church plan to enter into an agreement that would allow for a shared use agreement of the entire property to allow condominium owners to use

some of the church facilities and vice versa. They also plan an agreement regarding maintenance and quasi-public areas, reciprocal easements, open space and the use of the garage. However the specific details regarding cost sharing and actual use have not been worked out. *Id.* at 34-35. Mr. Wagner did expand on the issue of parking for the condominiums, stating that the plans show about 40 spaces above the County requirement, more than what would be needed by residents, so some could be visitor spaces. *Id.* at 35-36. On cross examination, Mr. Wagner repeated that the details of a shared use agreement had not been worked out. He acknowledged that the facility use would most likely be event related and that there may be some free sharing of space, but there would not be an open, 24-hour-a-day arrangement for residents to go play basketball, or church goers to use the condominium pool. *Id.* at 39-40.

Mr. Wagner acknowledged that he was aware of the obligations of the re-zoning classification and binding elements for PD-44 zones. He also acknowledged that Bozutto and BAOG intended, as co-applicants, to operate in accordance with the statements and plans submitted with the application for re-zoning. *Id.* at 35.

On further cross examination, Mr. Wagner explained the demolition phase would likely last no more than 30 days. *Id.* at 36. He stated that all the parking would be underground, below the first level of the church sanctuary, so there would be digging on the east side of the church sanctuary. *Id.* at 37-38. Steel pilings would be driven into the ground as part of a bracing system, called sheeting and shoring, to support the church building during garage construction. *Id.* at 38-39.

Mr. Wagner states that the relationship between Bozutto and the church, regarding the construction of the community building, is that of contractor and owner. The church would pay Bozutto as contractor to build a building. *Id.* at 41-42. He noted that the relationship is different regarding the condominiums because the church will be selling BAOG the land. The church will get a newly renovated church and community/education building along with parking, day care site,

etc., while Bozutto and BAOG will purchase land from the church and build the condominiums. *Id.* at 42-43.

9. Marvin T. Tollefson, Pastor, Christ Evangelical Lutheran Church. Tr. June 24 at 46-102.

Reverend Tollefson has been a clergyman for 38 years, the last 25 years as Pastor of Applicant Christ Evangelical Lutheran Church. The Pastor is responsible for weekly worship and preaching, pastoral care of parishioners and administrative oversight of the church. See Tr. June 24 at 47-48.

In 2000, the church began to look at the services it provided to the community and its fiscal ability to provide those services. The church was being asked to provide more and different services, because the community had itself grown and changed. The church commissioned a study of the buildings on site and determined that their age and construction would limit the ability to provide new and expanded services, especially for youth and younger children. *Id.* at 48. Three options were discussed after the study: move, renovate, or rebuild, to meet the needs of the church and the community. The church congregation chose the third option, issued an RFP, and selected Bozutto Homes, Inc. as its development partner. The church entered into an agreement with Bozutto's BA Old Georgetown Road, LLC (BAOG) and proceeded with the application process for re-zoning. *Id.* at 49-50. Rev. Tollefson explained that the church plans to sell part of its land to Bozzuto, then pay Bozzuto to build the new community center.

Rev. Tollefson is personally familiar with the re-zoning application, along with the plans and reports submitted with its application. He described goals to preserve and renovate the sanctuary and build a new, four-story family life center to house various ministries, including child care, non-profit functions, and a recreational center with a gymnasium. The plans also include an eight-story condominium building with 107 units including MPDUs. Parking is to be moved underground, additional green space will be created and buildings will be LEED certified. Rev. Tollefson expanded the plan's vision, stating that the church is in an advantageous location, accessible by car, bus, metro or walking. The church wanted to take advantage of that accessibility and to

provide more space for a spiritual community and enriching people's lives through caring relationships and meeting basic needs. *Id.* at 51-52.

Rev. Tollefson stated that with the new community center, current programs could be expanded and new services provided, such as increasing the availability of family counseling, doubling the size of the child day care facility and adding after-school care. *Id.* at 53. The new gymnasium would provide a place for youth to come play basketball or work out, since there is no public gymnasium in this part of Bethesda, and would also provide an exercise location for seniors, and a place for all kinds of family activities. *Id.* at 53-54. Rev. Tollefson stated this would be a community-based recreational center, open to all, with minimal fees. *Id.* at 54. The overall vision is a multi-level community building that on the ground level would have day care, the gym serving for early morning workouts for local professionals, day use by seniors, after-school activities for youth, and junior varsity or county basketball league games in the evenings. *Id.* at 93-94.

Rev. Tollefson acknowledged a lack of details for use agreements anticipated between the church and the condominium owners association. He suggested the agreements would include the shared costs of maintenance of the grounds and other common areas, as well as agreements to share facilities like the gym and pool, so as to be hospitable and inviting. *Id.* at 55-56.

Beginning in 2005, the church has engaged local home owner associations, community leaders, and individual neighbors to review plans for the proposed renovation and expansion. *Id.* at 57. Rev. Tollefson presented a Community Meetings List (CML) to document these meetings and additional conversations with individuals regarding the proposed expansion. *Id.* at 58. Rev. Tollefson confirmed that because of these conversations and meetings, the church has directed the architect to make several modifications to the original plan, especially changes along Rugby and Glenbrook for neighbors. *Id.* at 59.

Rev. Tollefson stated that the child development program will have a capacity of 125, and the target range is from infant to four years old, open to church and community members. He

noted that there would be additional State licensing for this program and the after school program would include five to eleven year olds. *Id.* at 82.

Rev. Tollefson was not sure of the number of basketball courts within three blocks of the church. He stated that the gymnasium at the church will have a regulation junior varsity basketball court and additional side rooms with workout equipment. *Id.* at 84. All these facilities will be open to the public for use and rental, as the church and its buildings currently are. *Id.* at 84-85.

Rev. Tollefson acknowledged that he is fully aware of the obligations of the Applicants and requirements of the proposed PD-44 reclassification. As representative of the church, he is ready to operate and abide by all requirements and binding elements of the application. Further, he emphasized the enthusiasm with which the church has embraced the project. *Id.* at 62-64.

Under cross-examination, Rev. Tollefson stated that when the RFP was issued, the overall intent was to find a developer who was flexible and could help make the services the church wanted to bring to the community viable. *Id.* at 64. The church's motivation was always to better serve the community. *Id.* at 65. During the community meetings there were concerns regarding the `condominium, however, Rev. Tollefson reiterated that the need-based assessment drove the project and that is how they came up with the plan. *Id.* at 65-66.

Rev. Tollefson acknowledged the steeple will be blocked from view to the houses right behind the church but noted that the steeple has a great deal of visibility from a number of angles. *Id.* at 69. He conceded that the number of parishioners has decreased in the last 15 years, however, many still attend who live within walking distance, and about 60% reside within a 2-3 mile radius. He stated the church primarily serves the Bethesda-Chevy Chase area, which is about a 4-5 mile radius. *Id.* at 70-72.

Rev. Tollefson reiterated the three options the church had when considering the future of the property, noting that renovating would cost almost half as much as rebuilding and they would get more by rebuilding. *Id.* at 73-74.

In later testimony, Rev. Tollefson stated that the church is first limited by funding and secondly by mission. To meet the mission/goals, the church looked at what was wanted or needed in the community, then considered how they would pay for it. *Id.* at 100. Partnering with Bozutto was only a part of being able to pay for the rebuilding. *Id.* at 101.

Rev. Tollefson stated that homes on Rugby and Glenbrook owned by the church are used for various ministries. One currently houses a family that lost their home in hurricane Katrina. *Id.* at 75-76. He explained that while the church will lose that house for emergency help if the proposed redevelopment goes forward, they will gain space to work with Lutheran Immigration and Refugee Services, who will work out of offices on the second floor non-profit space, which will be better able to relocate immigrants, refugees and homeless people in the surrounding area. This would be an expansion of services for the church. *Id.* at 76.

Rev. Tollefson acknowledges that there have been discussions with Bozutto regarding the parking structure. *Id.* at 77-79. He noted that there are currently 62 parking spaces, and an additional 70 adjacent at the rescue squad if need be, with an additional 700 + spaces at a public parking facility 500 yards away. *Id.* at 79-81. He stated that the church has agreements with other non-profits that regulate the timing and use of space at the church for different activities and for people who come to utilize services. This would continue with the new building. *Id.* at 99. Rev. Tollefson states that a fair number of people come from the surrounding neighborhoods and walk to the church and its functions. *Id.* at 98.

In response to a question from a community member, Rev. Tollefson stated that removing all the trees on site concerns him, but he thinks it would be balanced by increased green space and redeveloping the front of the church with new trees, creating a more beautiful environment. *See id.* at 91-92.

10. Michael Lenhart, transportation planner. Tr. June 24 at 108-192.

Mr. Lenhart was designated an expert in traffic engineering and transportation planning. He is personally familiar with the property in question, the surrounding area and the application, and prepared the analysis of transportation issues for the project. See Tr. June 24, 2008 at 108-111.

Mr. Lenhart explained the changes in LATR and the new Policy Area Mobility Review (PAMR) standards, which will apply to this project if it proceeds to subdivision. He then described the traffic study he prepared in this case, as discussed in Part III.F.

Mr. Lenhart noted that the subject property is just outside the Bethesda CBD, but is within the Bethesda Transportation Management District. The goal of the district is to reduce vehicle trips by 30% or so within the designated area. See *Id.* at 120; Tr. Sept. 9 at 14-15. If the proposed project goes forward, it will be required, as a Planning Board condition, to participate in the transportation district and in programs to increase the use of transit and reduce personal vehicle use. *Id.* at 121-122.

Mr. Lenhart stated that at subdivision, PAMR would require a mitigation of 30% of the trips to the subject property. Through participation in the Bethesda Transportation Management District and steps such as providing a set of bike lockers along the frontage of Old Georgetown Road, as shown on the Development Plan. Mr. Lenhart stated that the Applicants would have no difficulty satisfying LATR and PAMR. See Tr. June 24 at 127.

Mr. Lenhart acknowledged community concerns regarding traffic on Rugby Avenue and Glenbrook Road. He noted that Old Georgetown Road would be the primary access point for residents and day care, and Glenbrook for the church and community center. Mr. Lenhart opined that there should not be any restrictions into or out of the subject property on Glenbrook Road for building residents. Mr. Lenhart acknowledged testimony from the architect that traffic through the garage would be one-way during peak day care center drop-off and pick-up hours. Mr. Lenhart does not consider that necessary, although it could be done. *Id.* at 134.

Mr. Lenhart acknowledged that there is no one specific formula for determining how much traffic will go a certain way, however, he does contend that the overall travel patterns are dictated in the LATR guidelines, which is a well established formula at MNCPPC. *Id.* at 134. Mr. Lenhart does not agree with the assessment that the proposed project would lead to an increased use of Glenbrook Road as a cut through. He pointed out his analysis, which shows that during peak hours, traffic volumes on Glenbrook are very light. He noted that the intersection of Rugby and Glenbrook operates at a CLV of 165, and the allowable threshold is 1,800. *Id.* at 135. Mr. Lenhart points out that Norfolk is identified as a main street in the Woodmont Master Plan and Glenbrook Road is located at the very end of it, thus feeding into it, so some traffic should be expected. *Id.* at 136.

Mr. Lenhart observed that Auburn Avenue at Old Georgetown has is a traffic signal, so coming from Rugby, it is much easier to get onto Old Georgetown at Auburn. Glenbrook has turn restrictions, which make for a more difficult drive and reduce its traffic counts. That incentive would continue with this project in place. Existing volumes suggest that Glenbrook is not a significant cut-through.

Mr. Lenhart addressed parking, as outlined in Part III.F.

Mr. Lenhart opined that from a traffic point of view, the proposed rezoning would be in harmony with the general character of the surrounding neighborhood, would not have any detrimental impact on the use and enjoyment of surrounding properties, and would not have an adverse effect on health and safety, including vehicular or pedestrian safety. *See id.* at 156.

Under cross-examination about the article on day care center parking that he used, Mr. Lenhart acknowledged that of the 29 day care centers cited in the article, only two were as large as the day care center proposed for this site, and none had structured parking, or were located in a mixed-use building. *See id.* at 158-59. Mr. Lenhart is not aware of any child day care centers located in a mixed use facility with underground parking shared with a residential building as well

as other community-oriented uses, but he is aware of many projects with shared parking resources, and he considers this no different.

Mr. Brown asked Mr. Lenhart to compare traffic levels on Glenbrook Road and the next street going towards the CBD, Auburn Avenue. Mr. Lenhart calculated traffic going both directions on Glenbrook at 170 trips during the morning peak hour and 159 during the evening peak hour. See *id.* at 168. At Auburn, he calculated 239 total morning peak hour trips and 430 in the evening. See *id.* Mr. Lenhart agreed that the numbers are not very far apart for the two intersections. He stated that this is because they both experience the same through traffic on Old Georgetown Road.

Mr. Lenhart acknowledged that some residents can be expected to turn left from Old Georgetown Road in to the subject site if the development goes forward, and that turning left at that location would be more difficult than turning right. See *id.* at 170-71. He noted, however, that there is a left-turn lane for cars to sit in waiting for a break in the traffic. He estimated that the proposed development would cause peak hour left turns into the site from Old Georgetown Road to increase by two in the morning and five in the evening. See *id.* at 171.

Mr. Lenhart expects the Old Georgetown Road driveway to have full movements, if the development goes forward, although he acknowledged that the State Highway Administration may choose to restrict left turns leaving the site. If that were the case, he suggested that drivers could exit the site onto Glenbrook and proceed to Auburn, where they can make a left turn at the traffic light. (At the time of this testimony, the Development Plan did not provide for access in and out of the site via Rugby Road, except for deliveries.) He stated that this would be a minimal amount of traffic and would have no effect on his conclusions. See *id.* at 174. Due to the low volume of trips he expects, he thinks it would not be a problem for residents to drive past the day care center queue to exit onto Glenbrook Road. Moreover, Mr. Lenhart opined that the site access point would not need a left-turn restriction at Old Georgetown Road because the volumes are much lower than at Glenbrook Road. He expects the gaps created by nearby traffic signals to be adequate for the small number of vehicles involved. See *id.* at 189.

Mr. Lenhart testified again under cross-examination at the last hearing date. He stated that his firm did not conduct a traffic signal warrant study or similar study related to the intersection of Glenbrook Road and Old Georgetown Road, because there are left turn restrictions during the peak hour. Similarly, they did not do a queuing analysis for the intersection of Old Georgetown Road and Battery Lane.

In response to questions from the Hearing Examiner, Mr. Lenhart described the basis for the trip generation rates used in his study. He stated that the traffic components they looked at were basically the day care center and the residential, because the church has the ability to schedule most activities in the church and community center to have minimal traffic impact during the peak traffic hours. See Tr. Sept. 9 at 7-8.

The Hearing Examiner asked Mr. Lenhart to address pedestrian safety and vehicular access concerns raised in a letter from community member Steven Teitelbaum. See Tr. Sept. 9 at 18-19, citing Ex. 300. He explained that there is no crosswalk across Old Georgetown Road and Glenbrook Road because it is not a signalized intersection – typically they do not put crosswalks on a major road if there is no traffic light, because they want people to walk to the nearest signalized intersection. In this case, there are traffic signals one block north of Glenbrook, at Battery Lane, and one block south at Auburn. Similarly, Mr. Lenhart stated, there are no crosswalks at the intersection of Rugby Avenue and Norfolk Avenue because it is not signalized. In Mr. Lenhart's view, crosswalks would not be a bad idea at that intersection, although he does not consider their absence to be a cause for concern, since there are sidewalks on both sides of the road and very good pedestrian connectivity. See *id.* at 22-23. He stated that the proposed project would have little impact on that intersection – the larger factor would be the nearby park.

Mr. Lenhart was adamant that his traffic study did not depend on additional dedications that were listed on a memorandum from Transportation Planning Staff at MNCPPC and then crossed out. He stated that the additional right-of-way at issue would have no effect on traffic conditions, because Old Georgetown Road could not be widened with all the development on it, and

Glenbrook already has a peak hour left turn restriction, reducing possible movements during the most congested time to straight and right, so is no need for an additional lane. See *id.* at 24-25. Even if Glenbrook were widened to create an additional lane, Mr. Lenhart opined that left turns would still be prohibited during the peak hours to encourage drivers to use the nearby signalized intersections. Mr. Lenhart disagreed with the notion that the Glenbrook/Old Georgetown Road intersection should be signalized. He contended that there are other nearby intersections with signals, and the State and County have put a left-turn restriction in place at Glenbrook to prevent it from becoming a main route to Old Georgetown.

On re-direct, Mr. Lenhart noted that Transportation Planning Staff agreed with a parking study that Mr. Lenhart did during the course of the hearing process. See *id.* at 31. He defended an article that he had relied on in that study, calling it inconsequential that only two of the day care sites referenced in the article had more students than proposed at the subject site. Mr. Lenhart considered the article well-founded because the authors used standard practice, collecting data from day care centers with varying numbers of students from 17 to 144, to get a good cross-section. He also noted that the 125 students anticipated for the proposed project falls within the range of centers studied. Mr. Lenhart drew the same conclusion with regard to the number of staff at day care centers cited in the study, noting the number proposed at the subject site is within the range of the study data. Mr. Lenhart also considered it immaterial that none of the sites in the article had structured parking or mixed use parking, as proposed in this case. "Parking is parking," he insisted. See Tr. Sept. 9 at 33. He explained that a study of day care center parking needs would have to focus on stand-alone day care centers to be able to isolate the parking needs for that use. That would be more difficult to do at a mixed use site. Mr. Lenhart acknowledged in later testimony that in general, having more data points allows a study to accurately fit the data to a curve. See Tr. Sept. 9 at 39. However, he considers the 29 samples used in the article to be sufficient, particularly considering that the result matched his field results at this site. See *id.* at 40.

Mr. Lenhart noted that when his firm surveyed the existing parking lot at the church, they found that the parked vehicles associated with the child day care drop-off and pick-up matched almost exactly the trip generation rates published by the ITE for a day care center of the same size. See *id.* at 34.

Finally, Mr. Lenhart described the evolution of the Rugby Avenue access to the site. See *id.* at 36-37. The original proposal included a driveway from the end of Rugby that went around the north corner of the building and out to Old Georgetown Road. Later, connection around the corner of the building was changed to grass-crete pavers. On the final plan, the connection between Rugby and Old Georgetown has been reestablished, with an intention to install an electronic gate to prevent limit its use to building residents. This would prevent cut-through commuter traffic, a concern that had been voiced at an earlier stage in the hearing process. Mr. Lenhart noted that emergency vehicles can either have access to a key or, if necessary, drive through the gate. He noted that his traffic study was based on the original Development Plan, which included site access from Rugby Road. Thus, the numbers used in his study would not change.

B. Opposition

1. Geoffrey Uyehara, architect. Tr. Sept. 9 at 52 – 66.

Mr. Uyehara was designated an expert in architecture, although he is not a registered architect. Mr. Uyehara has a masters degree in architecture, and has designed buildings for approximately 20 years. He has made models before, although he is not a professional model-maker.

Mr. Uyehara created the model of the subject property based on the plans of project provided by the Applicants, then scanned into the computer and scaled down. Pieces are produced, similar to a puzzle, which are cut and put together. If the pieces do not match up, then the scale is wrong, however, in this model, everything fit together pretty well. See Tr. Sept 9. 54-55, 59.

Mr. Uyehara also did models of the surrounding homes based on photographs and measurements that he took. *Id.* at 55. He opined that his model of the subject property and surrounding houses are reasonably to scale. The model of the proposed residential building doesn't have things like windows because they were not on the plans provided to him. See *Id.* at 57. Mr. Uyehara also took the photographs of the model that were submitted at the hearing.

Mr. Uyehara only made what he was contracted to make, and that did not include the tall office building right across Glenbrook from the subject property. It did include the houses along Old Georgetown Road, which he agreed are farther from the site than the tall office building. *Id.* at 60-61.

2. Ralph Schofer, Transportation Engineer. Tr. Sept. 9, 2008 at 67-110.

Mr. Schofer was designated an expert witness in traffic engineering and pedestrian safety. See Tr. Sept. 9 at 72.

Mr. Schofer opined that the gated entry off Rugby Avenue would bring additional traffic to Rugby. He acknowledged that it would not be a lot of traffic, but stated that it would be significant because there is very little traffic there today. See *id.* at 73, 76. Mr. Schofer stated that Rugby Avenue will have the grand entrance to the residential building, and that is where taxi drivers and small delivery trucks will go. He noted that pedestrians walking past the gate would not be separated from vehicular traffic, creating a safety issue. Further, the additional access would put more traffic up by a highway intersection on Old Georgetown Road that is unsignalized, with pedestrian traffic. See *id.* at 73.

Mr. Schofer noted that the adjacent rescue squad has a driveway entrance off of Old Georgetown Road that crosses over the entrance proposed for the subject site, which currently exists, but would be expanded and used more extensively with the proposed development. He considers it a safety risk to vehicles and pedestrians to have two driveway entrances so converging on Old Georgetown Road at the same location. See *id.* at 75-76. He noted that the

current site driveway at that location carries one-way traffic, so changing it to two-way traffic would increase the hazard.

Mr. Schofer is concerned that the Glenbrook Road access point would raised safety issues because trash trucks, furniture delivery trucks and other large vehicles will be unable to turn around inside the garage, so they will have to turn around on Glenbrook Road – a narrow street – and back into the underground garage. He considers this hazardous for pedestrians and other motorists trying to use the Glenbrook Road access to the garage. See *id.* at 77-78. He also believes the garage access from Glenbrook has the potential for many conflicts among the various motorists coming to the child day care center, church activities such as weddings and funerals, community center activities, trash pick-up, an moving trucks. See *id.* at 79. He argued that the potential for conflicts is particularly acute because the site would be managed by two different entities, Bozzuto and the church, leading to potential coordination problems. See *id.* at 102.

Mr. Schofer's chief concern about the garage is the child day care center, which he believes, based on the name he saw on a sign on the site, will operate like a nursery school, with a set starting time, rather than a day care center, where children arrive and leave at varying times. Mr. Schofer argued that more parking is needed for a nursery school because all the parents arrive within a brief period of time. He contended that dropping off or picking up a pre-schooler takes some time, so the turnover in the parking spaces would not be as quick as the Applicants' experts assumed. See *id.* at 80-82.

Mr. Schofer contested the validity of the two articles cited by Mr. Lenhart, noting that the one on queuing was based on a single study at a single site, and the one addressing parking was based on 29 sites, only two of which were a large as the day care center proposed in this case. He considered the articles inadequate, moreover, because they contained no statistical tests of the data, which he considers common in traffic engineering magazines.

Mr. Schofer believes that the queuing space within the proposed garage is inadequate, in large part because he believes that parents will not want to wait in a line to pick up or drop off a

child, but will park and walk in to the day care center. This conclusion appears to be based in part on Mr. Schofer's personal experience as a grandparent. He maintained that drivers will need more space to line up because they will be waiting for parking spaces, not for a drop-off/pick-up point. *See id.* at 84-85.

Mr. Schofer stated that if the residential building were the only use proposed, the first change he would make would be to separate the loading dock and trash area from the garage access and egress, because they don't fit together, and they have different functions at different times. *See id.* at 86. Looking at apartment buildings in the area in the weeks leading to the hearing, Mr. Schofer did not find any that had a loading dock commingled with parking. Here, the Applicants proposed to commingle multiple streams of traffic with the loading dock and trash area.

Mr. Schofer argued that the courtyard/playground serving the day care center should have two egress points, not just the one to the garage. *See id.* at 90. He was perhaps unaware that the playground would also have access into the community building, and thence to the outside. Mr. Schofer is also concerned about exhaust fumes collecting in the playground, which would be closed in on three and a half sides.

Mr. Schofer opined that the Sector Plan recommendation for a 50-foot building height limit in the first 60 feet from Old Georgetown Road should certainly be interpreted to measure the 60-foot area from the road right-of-way. *See id.* at 91-92. He explained that the right-of-way line is physically established and can be reproduced, and a surveyor can mark it. Mr. Schofer consider a curb line a very indefinite surface, because it is based on the design of the curb, which can take many shapes and is ill-defined. *See id.* at 92. In 40 years as an engineer reviewing engineering drawings, Mr. Schofer stated that he has never seen dimensions measured from the face of curb rather than the road right-of-way, which delineates the separation between private and public property. The curb face can change, he noted, without a change in the right-of-way.

On cross-examination, Mr. Schofer acknowledged that it might be possible to address some of the garage conflicts he raised with operational solutions. *See id.* at 102-103.

3. Kenneth C. Doggett, land planner. Tr. Sept. 9 at 111-145.

Mr. Doggett was designated an expert in land planning. He opined that the design currently proposed would be inconsistent with the Sector Plan and incompatible with the neighborhood.

Mr. Doggett testified that the PD-44 Zone has no setback, lot coverage or FAR requirements, so the function of the green area requirement is to act as a constraint on what can be built. He suggested that in theory, a building with a flat roof could be built out to the lot lines with all of the green area on the roof, and it has often been done. In Mr. Doggett's view, from a planning perspective, green area should always be on the ground, not on the roof, so that the entire development can benefit from the green area, as well as neighbors in the community. Mr. Doggett reviewed textual binding element 8 on the Development Plan, which states that "[a]ll green areas (including active/passive recreation rooftop green area) will be accessible to all residents or occupants of the buildings." He questioned whether occupants of the church and community center building would actually be able to use the rooftop green space, which would be on the proposed residential building. Mr. Doggett does not consider it feasible to keep the rooftop open to, for example, people who are playing basketball in the new community center. In his view, residents of the multi-family building who are relaxing by the pool would not want an entire basketball team to show up at the pool.

Mr. Doggett offered a definition of "compatible" from Webster's dictionary: compatible means capable of existing or operating together in harmony without negative impacts on other components. Tr. Sept. 9 at 115. In the present case, Mr. Doggett identified three compatibility failures: compatibility with the adjacent residential homes, isolation and compatibility with other homes in the area, and internal compatibility of the proposed buildings to the site. He addressed each in turn.

Mr. Doggett described the scale of the development proposed on the subject site as the primary compatibility problem with the adjacent and nearby houses. See *id.* at 116. Referring to the scale model of the proposed development, he observed that there would be very little relationship between the houses on Glenbrook, Rugby and even Old Georgetown Road and the massive buildings next to them. He acknowledged that the building had been moved back to create a larger setback

from the Wash residence, but described that as a very small improvement. See *id.* at 125. Mr. Doggett suggested that the model is quite kind in depicting the proposed residential building, because it does not show balconies that would stick out from the building, with a view down on the nearby homes.

In addition to the mass and height of the proposed buildings not being compatible with existing homes, Mr. Doggett considers the likely traffic and noise increases incompatible. He acknowledged that the traffic is acceptable from a technical point of view, but suggested that the proposed development would cause incompatible increases in the level of activity on Rugby Avenue and Glenbrook Road. In his view, a seven or eight foot fence would not block light from vehicles of buildings. For the closest home on Glenbrook, in particular, there would be no protection from the glare emanating from the multi-family building.

Mr. Doggett opined that the subject site is just too small to provide for a reasonable transition between the single-family homes and a high-rise building. In his view, an appropriate transition would require a medium-sized building or extended open space. He contended that single-family home residents expect a degree of privacy, which they would not receive with a multi-family high-rise looking down on them. Apartment dwellers, on the other hand, do not have the same expectation of privacy. They expect to share things.

Mr. Doggett disagreed strongly with Technical Staff's suggestion that the residential enclave adjacent to the subject site should be replaced over the long term – he interpreted this as a suggestion that the homes should be permitted to deteriorate, something he has never seen suggested for a stable residential neighborhood like this one. See *id.* at 121. Mr. Doggett stated that there has been a lot of renovation in this little neighborhood, and some homes are quite small, but they are in extremely good, stable condition and are not deteriorating. He noted that three of the homes have recently been sold for \$1.6 million and above, showing the ongoing value of these houses.

Mr. Doggett argued that a PD-44 development could coexist with the stable, residential community adjacent to this site if it were done at a different scale. As currently proposed, he opined,

the buildings are too large and too close to the houses. He noted that the impact of the multi-family building's height would be increased by a drop-off in grade going down Rugby Road. See *id.* at 137. Moreover, he argued, a building of the size of the proposed multi-family building would isolate the houses on Rugby and Glenbrook, which already have larger buildings nearby. Mr. Doggett drew the distinction that the existing nearby buildings are at a scale that is quite pleasant, three to four stories for the most part, except for the high rise on Battery Lane that is visible through the trees. He noted that the existing larger buildings are well screened, with the exception of the first station, which is not tall, but lacks any screening at all.

Turning to the question of internal site compatibility, Mr. Doggett opined that the proposed project is too intense for the site. See *id.* at 131. He suggested that without the church and community center, 107 multi-family units could be laid out on the site quite reasonably. He finds the proposed layout tremendously compressed, and would consider it extremely difficult to successfully design a project that incorporates the church and residential uses at the densities proposed. See *id.* at 138. Mr. Doggett believes that using rooftop green area to get your zoning is not sound planning. He argued that green roofs are an environmental feature, and sometimes a tax factor, but are rarely used to get a zoning through. Mr. Doggett finds the current site layout, on the other hand, to be quite good in terms of preserving the houses south of Old Georgetown Road. See *id.* at 137. The church is a dominant feature, especially the spire. Mr. Doggett suggested that with the two new buildings on almost the same line as the church, the spire would be barely noticeable for people driving by.

Mr. Doggett stated that setbacks are always calculated from right-of-way lines, not curb lines, and he believes that was the intention of the Sector Plan regarding the 60-foot setback from Old Georgetown Road. See *id.* at 132-33. He opined, moreover, that insufficient evidence was presented to provide that the needs of the church really require intruding into the setback area. See *id.* at 142.

Mr. Doggett considers the day care center courtyard/playground area inappropriately hemmed in by tall buildings on three sides. He argued that the proposed buildings would also create a barrier between the houses on Rugby and Glenbrook and the houses across Old Georgetown Road, which

currently have a connection. In his view, if this development is approved it will be a signal that the nearby homes should be sold. Mr. Doggett noted that in his tour of the neighborhood, he saw no commercial signs on any of the houses across Old Georgetown Road from the subject site.

In response to a question from the Hearing Examiner, Mr. Doggett agreed that in reality, there are more houses across the street on Old Georgetown Road than the two that are shown on the scale model. He explained that originally there were not plans to show the other side of Old Georgetown Road, but when he saw that the Sector Plan specifically addresses those homes, Mr. Doggett asked the model maker to provide two typical houses.

Mr. Doggett observed that the site has some fine trees, all of which would have to come down to accommodate the level of development currently proposed. See *id.* at 136-37.

Mr. Doggett opined that housing can be compatibly built in close proximity to a church, using as an example a church two blocks from where he lives, on Wisconsin Avenue and Observatory Circle in Washington, D.C. See *id.* at 139. Mr. Doggett presented two photographs of the church and adjacent apartment buildings, which are reproduced below. He stated that the church was running into financial problems and sold part of its land to a developer who built a four-story building. The church spire remained the dominant feature, and they created a garden in the front, and facilities for the church to have a homeless shelter and indoor recreation space, but not a big basketball court. Mr. Doggett offered this example to suggest that the type of development proposed here could be done compatibly, but on a more modest scale. He noted that the buildings could perhaps be slightly taller than in the example he cited, but without the massiveness currently proposed.

4. Sara Gilbertson, President, Battery Park Citizens Association. Tr. Sept 9 at 146-172.

Ms. Gilbertson is the President of the Battery Park Citizens Association, which has approximately 150 homes south of Old Georgetown Road. She was previously Vice President for two years. Her house is on Battery Lane, two doors from Old Georgetown. She is familiar with the proposed plan for the subject property, but stressed that neither she nor Steve Teitelbaum, the immediate past President, ever met with the Applicants about the project. *Id.* at 147.

Ms. Gilbertson stated that the entire Association is 'universally unhappy' with the proposed project as it has been presented thus far. *Id.* at 147. She conceded that the Association did not take a formal vote on this question, but everyone she has spoken to about it is opposed. *See Id.* 152-53. She noted that her Association has not chosen to take votes on land use matters.

Ms. Gilbertson declared that homes in Battery Park, including on Old Georgetown Road, are not permitted to have commercial signs. It is her job to make sure there are none, and she is positive that none currently exist. *See Id.* at 147-148.

Ms. Gilbertson noted that there is a "beautiful gym" at Bethesda Elementary School, where a number of groups play basketball. *See Id.* at 148.

Ms. Gilbertson also mentioned a new building on Arlington Road in the Edgemoor Area as a good example of a moderately-sized building transitioning to single-family housing. She argued that blocking the view of the church steeple from all directions except straight out front diminishes its impact.

5. Herbert Estreicher, next-door neighbor. Tr. Sept. 9 at 173-194.

Mr. Estreicher resides at 8008 Glenbrook Road, adjacent to the subject property. His property would face the community center to one side and a wing of the residential building to the rear, if they were to be built. *See Tr.* September 9 at 173.

Mr. Estreicher noted that several homes along Glenbrook and Old Georgetown Road, including his, have sold for between \$1.6 - \$1.8 million. His next door neighbors would like to build a larger home on their property, but have hesitated because of this project. Mr. Estreicher objects to Technical Staff designating his neighborhood for renovation, and treating it like a 'throw-away' neighborhood. *Id.* at 174-175. He opined that this is not a throw-away neighborhood, and stated that not one family on either Glenbrook or Rugby supports this proposed plan, except for one who is a church member and has taken a neutral position. *Id.* at 174-175, 179. Mr. Estreicher stated that his neighborhood is lovely, including the homes across Old Georgetown Road, and it deserves to be preserved. *See Id.* at 182.

Mr. Estreicher called the office building at the corner of Glenbrook and Old Georgetown Roads is “ugly as sin”, but suggested that this does not justify putting a monstrosity next to it. He noted, moreover, that a large parking lot separates that office building from the adjacent home, with a distance between them of at least 110 feet, much more of a buffer than the Applicants propose for Mr. Estreicher’s home. *Id.* at 175.

Mr. Estreicher considers it completely unacceptable that the space from his property to the community building is only some 40 feet in distance, and from the residential building to his home is approximately 20 feet. His home is four stories, and the basement is on a sub-level, where all the windows would look out onto the community center and residential buildings. His patio, his favorite part of the house, where he sits and walks, would look right at condominium windows. Further, he would be under constant viewing from the residential building windows. Mr. Estreicher notes that the bedrooms of his home are on the third floor, and that the windows from the community and residential buildings will be able to look right into his home. He opines that he will not be able to use his patio anymore and will have to move his furniture to the front of his home, away from the rear and side where he now has his main living space. *See Id.* at 177-179.

Mr. Estreicher stated that the proposed project is at the wrong scale for this location, and that other plans could be appropriate for the site, without putting such massive edifices next to single-family homes. *See Id.* at 180.

Mr. Estreicher stated that when he purchased his home in November of 2006 from Kohler Builders, for approximately \$1.6 million, he was not made aware of the plans for the subject property. *See Id.* at 185. He emphatically declared that he would never have purchased his property, had he known of the “monstrosity” being built next to it. He noted that he purchased his 6,000+ square foot home in this particular area because of its proximity to the Metro station. *See Id.* at 186.

Mr. Estreicher acknowledges that there is a two-story house adjacent to his home, and he looks at the wall of the house right from his balcony, but notes that he still can see daylight. *See*

Id. at 187. Looking north of his home, Mr. Estreicher has a seven foot high fence that surrounds the sides and back of his property. *Id.* at 188. He stated that despite the tall office building across Glenbrook, currently his predominant view is of the sky, trees and open air. *Id.* at 191. He opines that a seven foot privacy fence will not protect him from a 114 foot tall building, and that he is worried how the development will affect his yard. *Id.* at 192-194. He does not understand how the green roof will provide vegetation or landscaping, but he does know that several old growth trees will be eliminated. *Id.* at 195.

6. Patsy Wolfe, Glenbrook Road resident. Tr. Sept. 9 at 195-201.

Ms. Wolfe resides at 8012 Glenbrook Road, three houses away from the subject property. See Tr. September 9 at 195-96.

Ms. Wolfe passionately discussed the neighborhood in which she lives. She stated that 70 percent of the residents on Glenbrook and Rugby own and live in their own homes, and have no intention of leaving anytime soon. She stated that her neighborhood, the neighborhood surrounding the subject property, is not a throw-away, or tear down, or transient place, but a true neighborhood. See *Id.* at 197.

Ms. Wolfe observed that the neighborhood is a blend of people, from young professionals to empty nesters to grandparents. They all know each other, socialize together, say hello and chat with each other. She identified the other 30% of the neighborhood as renters, one of whom has been there for 14 years. She stated that even the renters care for their rental property like a home and are very concerned about the proposed development on the subject property, which would be very sad for them. See *Id.* at 198. Ms. Wolfe fears that the project will have an adverse impact on the neighborhood, partly because of increased traffic which will reduce safety. She expects that interaction between the single family homes and the residents of the condominium would be non-existent. *Id.* at 200-201.

Ms. Wolfe acknowledged that in the last year she and her husband had bought a 1936 home in the neighborhood, in addition to their own home, to make sure it wouldn't get torn down, and resold it, even with the present application pending. *See Id.* at 199.

Ms. Wolfe does not support the re-zoning application or the proposed project on the subject property.

7. Bernard Wolfe, Glenbrook Road resident. Tr. Sept. 9 at 201-204.

Mr. Wolfe resides at 8012 Glenbrook Road, three houses away from the subject property with his wife, Patsy. *See Tr.* September 9 at 195.

Mr. Wolfe is very concerned about traffic safety, particularly when he walks with his grandson to Battery Park. He stated that the Park is a very busy place, and will be even busier after upcoming renovations. However, there are five different street entrances converging at the intersection of Glenbrook, Rugby and Norfolk streets, and it is sometimes very difficult to get across the streets, especially during peak traffic hours. *See Id.* at 202. Mr. Wolfe worries that the proposed project will bring increased traffic and congestion creating more safety issues.

Mr. Wolfe opined that the neighborhood is not transitional, it is a solid neighborhood. Further, he stated that he was never notified of any developments or potential developments, when he purchased his home from the developer. *See Id.* at 203-204. He loves his neighborhood and plans to stay for a long time.

8. Shawn Russell, Glenbrook Road resident. Tr. Sept. 9 at 204-209.

Mr. Russell resides at 8014 Glenbrook Road, four houses away from the subject property, at the corner of Rugby and Glenbrook. *See Tr.* September 9 at 204.

Mr. Russell's concerns are public safety, traffic congestion, noise and compatibility with the proposed structures. He noted that the traffic is very heavy at peak times, during the morning and evening commutes, and the streets are very narrow. Mr. Russell disputes any traffic report that declares Glenbrook is not a cut through to get to Bethesda. He is concerned that if the proposed plan is allowed, that would add two additional entrances onto and off of property in the

neighborhood, which would increase traffic. *Id.* at 205. Mr. Russell added that he also takes his young daughter to Battery Park during rush hour and has to dodge traffic, as people are darting around. *Id.* at 206-207.

Mr. Russell argued that the size of the proposed project does not fit the neighborhood, as it is too big, with no transition. He stated that this small, vibrant community, with all the families in it, will be subjected to increased traffic and that is a public safety issue. He also takes issue with the loss of green space, trees, and sunlight, because of the over-building proposed. *Id.* at 207.

Mr. Russell purchased his home in April of 2007. He was not made aware of this application for re-zoning. He did know that he was moving to a more congested area near a Metro, but did not have knowledge of the pending project. Mr. Russell acknowledged that he did not investigate whether there were any developments planned in the neighborhood. *See Id.* 208-209.

9. Steven Teitelbaum, Battery Park resident. Tr. Sept. 9 at 209-220.

Mr. Teitelbaum resides at 7813 Exeter Road, south of Old Georgetown Road, five houses down from the corner of Old Georgetown and Glenbrook Roads. *See* Tr. September 9 at 210, Ex. 346.

Mr. Teitelbaum has lived in his Battery Park neighborhood for 18 years. He sees the neighborhood as being very stable noting that it has existed for 70 years. Mr. Teitelbaum considers the proposed project fundamentally flawed because it is not compatible with the existing single family homes in the area. The proposed buildings are too massive in bulk and height for the site and surrounding neighborhood, and will also cause increased traffic. *See Id.* at 211.

Mr. Teitelbaum stated that even the Planning Board didn't consider the proposal compatible, but stated that the "compatibility issue can be more effectively addressed at site plan than at rezoning." *See Id.* at 211-212. He stated that the Planning Board saw past the 'white wash' job in the Staff Report

Mr. Teitelbaum argued that the re-zoning should be rejected based on the height, bulk and mass of the project, which is completely out of keeping with the single-family residential

neighborhoods. He noted that the only buffer for Battery Park would be distance, but the distance is minimal. Further, regarding property lines and such, he stated that because of the 'postage sized' lots in Battery Park and surrounding neighborhoods, sometimes neighbors haggle over inches, where in this project there is encroachment of several feet into the setback space. *Id.* at 212-213.

Mr. Teitelbaum maintained that Bethesda development has demonstrated that we know how to do transitional buffers better than this. He cited the Edgemoor area along Arlington Road is an example of a business area where homes are buffered by more modest developments. Mr. Teitelbaum suggested that the Battery Park neighborhood should be afforded the same respect in planning. He argued that this proposal is out of keeping with the master plan goal of maintaining a low-rise, residential feel on Old Georgetown Road, even as it becomes more institutional. *See Id.* at 213. He cited a church and synagogue, up one-tenth a mile on Old Georgetown, which were renovated within the last few years and did not overwhelm the neighborhood as this proposed project would. Mr. Teitelbaum noted that the Sector Plan does not cite the 7979 Old Georgetown Road (the 11-story office building) as the standard of compatibility with the surrounding neighborhood. *Id.* at 213-214. He asks the County to use its planning expertise to do right by the community that County leaders are bound to protect. *See Id.* at 214.

Mr. Teitelbaum opines that there are many items in the proposed plan that are good and will benefit the community, however, it can be done in a manner more respectful of compatibility with the surrounding neighborhood. *Id.* at 214-215.

When Mr. Teitelbaum was President of the Battery Park Citizens Association from May 2006 to May 2008, he did not hear from a single resident who liked the proposed project on the subject property, but heard from many who opposed it. Further, all the letters that did come from the neighborhood were not solicited by the citizens association. *Id.* at 215.

Mr. Teitelbaum recalls being at a community meeting, before he became president of the citizen's association in May, 2006, when the Applicants made a presentation about the project. He

also recalls an open session about the project at the church in spring of 2007. He testified that neither he nor Sara Gilbertson, the current president of his citizen's association, has had any direct discussions about the project with the church. See *Id.* at 218.

10. William Doggett, architect and Glenbrook Road resident. Tr. Sept. 9 at 220-232.

Mr. Doggett (no relation to Kenneth Doggett, Opposition land planner) resides at 8011 Glenbrook Road, three houses down from the subject site on the other side of Glenbrook, having purchased his home in November, 2006. Mr. Doggett has been a licensed architect for 33 years, and has had his office in Bethesda for the last 25. His practice is primarily commercial, and includes schools, churches, some residential, additions and alterations to commercial office buildings and new office buildings. Mr. Doggett stated that he is engaged by clients to do the same kind of thing as proposed here, so he knows "both sides of this table." Mr. Doggett opposes the proposed project because of the height and bulk of the proposed buildings. He stated that the church would be almost totally overshadowed by the other buildings, except from Old Georgetown Road. Mr. Doggett described the proposed development as "so non-conforming . . . that it's not laughable. It's terrible." Tr. Sept. 9 at 223-224. He declared that he has not studied the proposed design and does not need to because of the height -- 114 feet plus the effect of topography -- and bulk.

Mr. Doggett measured Glenbrook Road on the day of the hearing at 20 feet eight inches wide, which he described as not enough for two cars to pass, even without parking. He noted that parked cars have been side-swiped by passing traffic, and that when cars are parked on the street and two cars need to pass, one of them has to pull over. With the speed of cut-through traffic, Mr. Doggett considers it a safety issue. He loves living in this neighborhood, and understands that cut-through traffic and neighborhood traffic are something he has to accept. He cannot imagine, however, additional traffic using Glenbrook Road to get to and from the subject site.

Mr. Doggett observed that the church and its activities have been very respectful of the neighborhood, which he would expect from a church. He noted that the tall office building on the

corner of Glenbrook Road is much more respectful of the neighborhood than would be the “massive sprawling development” proposed around the church; it has more space around it, more green space at street level, and a street presence, whereas the proposed development does not have street presence, and is not at a scale that respects pedestrians or residents in the single-family dwellings. He argued that street presence is not accomplished just by doors that open at the ground level, but involves other features such as street-level landscaping that this plan doesn’t have room for because the building footprints are so great. The tall office building, moreover, was built probably 30 years ago and is part of the fabric now. In Mr. Doggett’s view, the development proposed here will never be part of the fabric even if it is approved. *See id.* at 225.

Under cross-examination by Mr. Brown, Mr. Doggett noted that the church spire would be slightly higher than the proposed 114-foot building, but the church as a whole would be dwarfed by the two massive, block-shaped buildings proposed. Drawing on his experience with church architecture, Mr. Doggett testified that the function of the church spire goes back to early church architecture, when the spire was a symbol of the church presence. *See id.* at 228-29. He acknowledged that the proposed buildings are shown with some nice articulation, but opined that the overall bulk is just too massive for the church and the neighborhood. *See id.* at 228. He contrasted this with the current church, which has a scale, spacing, setbacks and landscaping that are much more acceptable and welcoming for the community.

Under cross-examination by Mr. Kaufman, Mr. Doggett acknowledged that he had not measured the green space proposed here to compare it to the green space around the tall office building on the corner of Glenbrook. *See id.* at 230. He noted that the tall office building has greenspace along Glenbrook Road and a little bit against the building edge, as well as a green, landscaped area next to the parking lot. He accepted Mr. Kaufman’s representation that the Development Plan provides for over 90 percent of the required 50-percent green area on the ground, but stated that because of the height and bulk of the proposed buildings, “little strips of grass around a huge height and bulk really doesn’t do much.” Tr. Sept. 9 at 232.

Mr. Doggett is aware of the nine-story building that has been approved right behind his house, which would be much closer than the development proposed in this case. He did not oppose that project because he was not living in his current house when the preliminary plan application was filed. Fortunately, he noted, he has some cypress trees on his side of the fence that will shield him from some of that. See *id.* at 232.

11. Jim Humphrey, Montgomery County Civic Federation. Tr. Sept. 9 at 252.

Mr. Humphrey argued on behalf of the Civic Federation the proposed buildings would not be compatible with adjacent and confronting single-family detached homes, that the community center building would not conform to the setback recommended in the Sector Plan for a building of its height, and that the internal vehicular circulation systems and external driveway accesses for the proposed project are not safe or adequate, as currently proposed. See Ex. 348.

Mr. Humphrey emphasized the importance of master plan recommendations in a PD Zone case. He pointed out that the Sector Plan included language in its recommendations for the subject site noting that any rezoning application should be reviewed to determine compatibility with existing single-family homes, both north and south of Old Georgetown Road. Mr. Humphrey's contentions regarding the Sector Plan height recommendation applicable to the subject site are discussed in Part III.G above. He added that the Battery Park neighborhood across the street from the subject site is outside the area covered by the 1994 Plan or the Sector Plan, but both the 1994 Plan and the Sector Plan designate a 35-foot height limit adjacent to or confronting existing residential edge neighborhoods for all but a few, small portions of the edge of the plan area, as an appropriate transition height. See Ex. 348 at 2. This, he noted, is consistent with language in the Sector Plan stating that its height recommendations were designed to protect the neighborhoods at the edges of the CBD and concentrate building height near the Metro.

Mr. Humphrey stressed that the Civic Federation is concerned about lack of compatibility both for the homes on Glenbrook and Rugby and for the homes across Old Georgetown Road from the subject site, which are outside the Sector Plan and 1994 Plan area. He contended that currently,

building heights on the 1994 Plan edge confronting or adjacent to homes in Battery Park have been kept to the 35-foot maximum building height recommended in the Sector Plan.

Mr. Humphrey also took guidance from language in the 1994 Plan recommending a three-story height limit for a property on Arlington Road that confronts single-family homes across the Capital Crescent Trail. See Ex. 348 at 3. Having recently submitted a report on a rezoning case for that property, the Hearing Examiner considers it inapposite to the present case due to significant differences in the neighborhoods and the age of the 1994 Plan compared to the Sector Plan at issue in this case.

Mr. Humphrey noted that with a single main entrance into the garage off of Old Georgetown Road, church users and day care center customers will require access through the garage under the proposed multi-family building. He argued that this calls for a textual binding element stating that Bozzuto will grant the church a perpetual access easement for use of the Old Georgetown Road driveway and the garage, and an agreement that a certain number of parking spaces will be reserved for church use. He also suggested that Bozzuto might request an easement for moving vans to use the loading dock area, which would be on property owned by the church. The Hearing Examiner does not recommend approval of the present application, but is confident that if the application is approved, the church and Bozzuto will work out the necessary cross-easements to make the garage and both of its access points accessible to all parties using the site.

Mr. Humphrey raised an additional concern about access to the site via Rugby Road. At the outset of the public hearings in this case, the Applicants proposed to install “grasscrete” (a type of paving that allows grass to grow up in between the pavers, so that most drivers of ordinary vehicles would not want to drive over the surface) in the curve of the road between Rugby Road and the garage entrance, so that emergency vehicles would be able to go through the site, but no one else. When the effectiveness of this plan to deter cut-through commuters was met with some skepticism, the Applicants decided to eliminate the grasscrete and instead use a card-operated access gate, so that

building residents would be able to go in and out of the garage via Rugby Avenue (as well as, presumably, emergency vehicles) but no one else would be able to get through. See Ex. 348 at 5.

Mr. Humphrey argued that the availability of garage access from Rugby Avenue would generate a greatly increased volume of traffic on Rugby Avenue. He contended that residents traveling into Bethesda likely would use Rugby Avenue as their main route in and out of the site, due to the difficulty of turning left on Old Georgetown Road from the site, particularly during the morning and evening rush hours. Mr. Humphrey fears that this would increase the possibility of pedestrian accidents in this relatively quiet residential area, as well as at the unsignalized, oddly-shaped, five-way intersection between Rugby Avenue, Glenbrook Road and Norfolk Avenue. He concluded that the proposed access and circulation would not meet the “safe, adequate and efficient” standard established in the Zoning Ordinance. See Ex. 348 at 5.

V. ZONING ISSUES

Zoning involves two basic types of classifications: Euclidean zones and floating zones. The term “Euclidean” zoning arose from the seminal United States Supreme Court case upholding the land use authority of local governments, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Euclidean zoning divides the territory of a local jurisdiction into zoning districts with set boundaries and *specific regulations governing aspects of land development such as permitted uses, lot sizes, setbacks, and building height*. In the State of Maryland, a property owner seeking to reclassify his or her property from one Euclidean zone to another bears a heavy burden to prove either a change in circumstances or a mistake in the original zoning. See *Stratakis v. Beauchamp*, 268 Md. 643, 652-53 (1973).

A floating zone is a more flexible device that allows a legislative body to establish a district for a particular type of use, with land use regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating that the proposed location is appropriate for the zone, i.e., it satisfies

the purpose clause and requirements for the zone, the development would be compatible with the surrounding area, and it would serve the public interest.

PD (Planned Development) zones are a special variety of floating zone with performance specifications integrated into the requirements of the zone. These zones allow considerable design flexibility if the performance specifications are satisfied. The applicant is not bound to rigid design specifications, but may propose site-tailored specifications, within the parameters established for the zone, for elements such as setbacks, building heights and types of buildings. These specifications are set forth on a development plan to facilitate appropriate zoning oversight by the District Council. Pursuant to Code §59-D-1.11, development under the PD Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the PD Zone. Once it is approved, the development plan provides the design specifications for the site, much as the Zoning Ordinance provides design specifications for more rigidly applied zones. Accordingly, the evaluation of zoning issues must begin with the Development Plan and proceed to the requirements of the zone itself.

A. The Development Plan

Before approving a development plan, the District Council must make five specific findings set forth in Code § 59-D-1.61. These findings relate to consistency with the master plan and the requirements of the zone, compatibility with surrounding development, circulation and access, preservation of natural features, and perpetual maintenance of common areas. The required findings are set forth below in the order in which they appear in the Zoning Code, together with the grounds for the Hearing Examiner's conclusion that the evidence in this case does not support the required findings.

- (a) ***That the proposed development plan is in substantial compliance with the use and density indicated by the master plan or Sector Plan, and that it does not conflict with the general plan, the county capital improvements program or other applicable county plans and policies.***

In the present case, both the Planning Board and Technical Staff found that the proposed development substantially conforms to the use and density recommended in the *2006 Woodmont Triangle Amendment to the Sector Plan for the Bethesda CBD*. For the reasons outlined in Part III.F. and below, the Hearing Examiner disagrees. The proposed development would substantially conform to the use recommended in the Sector Plan, which is multi-family development under the PD Zone. However, based on the strong evidence that the proposed development is too dense to allow a compatible relationship with existing single-family homes, and the prominent role that such compatibility plays in the Sector Plan's recommendations for this site, the Hearing Examiner concludes that the proposed Development Plan does comply with the density recommended in the Sector Plan.

The evidence supports the conclusion that the Development Plan does not conflict with any other county plans or policies, or the capital improvement program. It would further county housing policy by creating additional housing options near the Bethesda Metro, including about 17 affordable units, and (as discussed in Part III.H above) would be consistent with the applicable Growth Policy.

(b) That the proposed development would comply with the purposes, standards, and regulations of the zone as set forth in article 59-C, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.

1. Purposes of the Zone

The purpose clause for the PD Zone, found in Code §59-C-7.11, is set forth in full below, with relevant analysis and conclusions for each paragraph following.

It is the purpose of this zone to implement the general plan for the Maryland-Washington Regional District and the area master plans by permitting unified development consistent with densities proposed by master plans. It is intended that this zone provide a means of regulating development which can achieve flexibility of design, the integration of mutually compatible uses and optimum land planning with greater efficiency, convenience and amenity than the procedures and regulations under which it is permitted as a right under conventional zoning categories. In so doing, it is intended that the zoning category be utilized to implement the general plan, area master plans and other pertinent county policies in a manner and to a degree more closely compatible with said county plans and policies than may be possible under other zoning categories.

It is further the purpose of this zone that development be so designed and constructed as to facilitate and encourage a maximum of social and community interaction and activity among those who live and work within an area and to encourage the creation of a distinctive visual character and identity for each development. It is intended that development in this zone produce a balance and coordinated mixture of residential and convenience commercial uses, as well as other commercial and industrial uses shown on the area master plan, and related public and private facilities.

It is furthermore the purpose of this zone to provide and encourage a broad range of housing types, comprising owner and rental occupancy units, and one-family, multiple-family and other structural types.

Additionally, it is the purpose of this zone to preserve and take the greatest possible aesthetic advantage of trees and, in order to do so, minimize the amount of grading necessary for construction of a development.

It is further the purpose of this zone to encourage and provide for open space not only for use as setbacks and yards surrounding structures and related walkways, but also conveniently located with respect to points of residential and commercial concentration so as to function for the general benefit of the community and public at large as places for relaxation, recreation and social activity; and, furthermore, open space should be so situated as part of the plan and design of each development as to achieve the physical and aesthetic integration of the uses and activities within each development.

It is also the purpose of this zone to encourage and provide for the development of comprehensive, pedestrian circulation networks, separated from vehicular roadways, which constitute a system of linkages among residential areas, open spaces, recreational areas, commercial and employment areas and public facilities, and thereby minimize reliance upon the automobile as a means of transportation.

Since many of the purposes of the zone can best be realized with developments of a large scale in terms of area of land and numbers of dwelling units which offer opportunities for a wider range of related residential and nonresidential uses, it is therefore the purpose of this zone to encourage development on such a scale.

It is further the purpose of this zone to achieve a maximum of safety, convenience and amenity for both the residents of each development and the residents of neighboring areas, and, furthermore, to assure compatibility and coordination of each development with existing and proposed surrounding land uses.

This zone is in the nature of a special exception, and shall be approved or disapproved upon findings that the application is or is not proper for the comprehensive and systematic development of the county, is or is not capable of accomplishing the purposes of this zone and is or is not in substantial compliance with the duly approved and adopted general plan and master plans. In order to enable the council to evaluate the accomplishment of the purposes set forth herein, a special set of plans is required for each

planned development, and the district council and the planning board are empowered to approve such plans if they find them to be capable of accomplishing the above purposes and in compliance with the requirements of this zone.

1st paragraph: Master Plan implementation. The first paragraph establishes consistency with the master plan as an important factor in applying the zone. Moreover, the density category indicated on the applicable master plan has special status in a PD Zone. If the District Council desires to grant reclassification to a PD Zone with a density category *higher* than that indicated on the applicable master plan, such action requires the affirmative vote of at least six members of the District Council. Code §59-D-1.62. In this case, the Applicants seek a density category that was recommended in the applicable master plan, so a supermajority vote is not necessary.

For the reasons stated in Part III.F. and paragraph (a) above, the Hearing Examiner concludes that the proposed development is not in substantial compliance with the Sector Plan. It would exceed the recommended height, whether one applies the 35-foot height limit shown on the building height map or the 50-foot height limit that Technical Staff applied, it would be inconsistent with the general recommendation building heights decreasing from the CBD towards the residential edge, and it would be incompatible with nearby single family homes due to the height, bulk and setbacks of the proposed buildings.

Second paragraph: social and community interaction, distinctive visual character, balanced mix of uses. The proposed development would encourage social and community interaction by creating rooftop recreation areas where building residents would have the opportunity to come together, and by enabling the church to continue providing worship, recreational and cultural opportunities that would be open to residents of the building and the wider community, as well as social services to people in need in the community. Many of the church activities would offer opportunities for social and community interaction. The proposed development would have a distinctive visual identity, but not necessarily a positive one. Based on the photographs submitted, the overall impression would be of a church crammed in between two much larger buildings.

Third paragraph: broad range of housing types. This development would increase the stock of multi-family housing available in downtown Bethesda and create a new housing option on this part of Old Georgetown Road.

Fourth and fifth paragraphs: trees, grading and open space. No evidence was presented concerning whether grading would be minimized, but because the site is already mostly covered with buildings and pavement, and already sits on a terrace several feet above street level, it appears that significant grading would be unnecessary. The Development Plan calls for removing all of the specimen trees on the site, which is difficult to reconcile with the purpose of the zone to preserve trees. The evidence indicates that the decision to remove all of the trees was made at least in part based on an expectation that they would not flourish in a high-density environment. Having concluded that the proposed development would be too dense for the site and the neighborhood, the Hearing Examiner cannot accept this high density as a justification to take down all of the trees on the site. As one of the neighbors suggested, reducing the size of the buildings might allow the Applicants to preserve some of the large trees, which would be consistent with the purpose clause and improve buffering.

The Development Plan provides for small ground-level open spaces along the front of the buildings, between the multi-family building and the church, around the site perimeter and in the interior courtyard/playground. With the exception of the playground, these areas would be linked by sidewalks and paths. The Development Plan also provides for rooftop open space, which would benefit residents of the building almost exclusively. As the Hearing Examiner has observed in other PD Zone cases, the language encouraging open space that benefits the community at large applies more readily to large sites, where significant open spaces may be available as quasi-public areas, than to a smaller, infill site such as the one at issue here, where shared public space is less practical. In this case, however, the nearly two-acre size of the site could potentially accommodate a larger area of ground-level open space, benefiting the community as well as site residents, if the site were redeveloped at a level of density compatible with the neighborhood.

The Hearing Examiner finds that this paragraph of the purpose clause is not satisfied.

Sixth paragraph: pedestrian networks. This paragraph also applies more readily to a large site with multiple buildings. Nonetheless, the Development Plan here provides pedestrian and vehicular linkages from Old Georgetown Road to each of the buildings, as well as pathways between the buildings and an improved sidewalk along Old Georgetown Road. This, as well as the site's location in downtown Bethesda, near countless shops, restaurants and other activities accessible within a short walk, would encourage pedestrian activity.

Seventh paragraph: scale. The PD Zone encourages, but does not require, development on a large scale.

Eighth paragraph, first part: maximum safety, convenience and amenity. The evidence demonstrates that the proposed development would provide a high degree of safety, convenience and amenity for site residents, with a convenient downtown location, and on-site amenities including a rooftop recreation area. It would also provide convenience and amenities for area residents generally, by allowing the church to continue providing worship, recreational and cultural opportunities open to the general public, as well as social services for people in need. The preponderance of the evidence supports a conclusion that the proposed development would not be detrimental to the safety of the community, given the small number of vehicular trips projected on the narrow neighborhood streets.

Eighth paragraph, second part: compatibility. For the reasons stated in Part III.F., the Hearing Examiner finds that the overwhelming weight of the evidence indicates that the proposed development would not be compatible with the surrounding area due to the size, bulk and setbacks proposed for the new buildings. Moreover, the testimony of Kenneth Doggett supports a finding that the Development Plan presents a form of development that would be internally incompatible due to building mass, height and poorly distributed green area. The Hearing Examiner is persuaded by Mr. Doggett's opinion that the site is simply too small to support the intensity of development proposed in a harmonious fashion.

Ninth paragraph: three findings. The purpose clause states that the PD Zone “is in the nature of a special exception,” and shall be approved or disapproved based on three findings:

- (1) the application is or is not proper for the comprehensive and systematic development of the county;
- (2) the application is or is not capable of accomplishing the purposes of this zone; and
- (3) the application is or is not in substantial compliance with the duly approved and adopted general plan and master plans.

On the Hearing Examiner’s reading, this element of the purpose clause does not add new requirements, but reminds the District Council of its responsibility to carefully consider whether the PD Zone would be appropriate in the location for which it is requested and would be in substantial compliance with the applicable master plan. The conclusions drawn earlier in this section govern the findings to be made here. Based on the preponderance of the evidence and for the reasons stated above, the Hearing Examiner concludes that present application is not proper for the comprehensive and systematic development of the County, is not in substantial compliance with the Sector Plan, and would not accomplish the purposes of the zone.

2. Standards and Regulations of the Zone

The standards and regulations of the PD-44 Zone are summarized below, together with the grounds for the Hearing Examiner’s conclusion that the proposed development would satisfy some, but not all of the applicable requirements.

Section 59-C-7.121, Master Plan Density. Pursuant to Code §59-C-7.121, “no land can be classified in the planned development zone unless such land is within an area for which there is an existing, duly adopted master plan which shows such land for a density of 2 dwelling units per acre or higher.” The subject property is recommended in the Sector Plan for residential development at a density of up to 44 units per acre, so this requirement is satisfied.

Section 59-C-7.122, Minimum Area. Code §59-C-7.122 specifies several criteria, any one of which may be satisfied to qualify land for reclassification to the PD Zone. The subject application satisfies the first of these criteria, which states the following:

That it contains sufficient gross area to construct 50 or more dwelling units under the density category to be granted.

The subject property contains sufficient gross area to permit the construction of 107 dwelling units.

Section 59-C-7.131, Residential Uses. All types of residential uses are permitted, but parameters are established for the unit mix. A PD-44 development with less than 200 units may, as proposed here, consist of 100 percent multi-family units.

Section 59-C-7.132, Commercial Uses. Commercial uses indicated on the applicable master plan are permitted in the PD Zone. Commercial uses are neither recommended for this site in the Sector Plan nor proposed on the Development Plan.

Section 59-C-7.133, Other Uses. No uses are proposed other than the residential use and the church. Houses of worship are permitted in all zones.

Section 59-C-7.14, Density of Residential Development. The Zoning Ordinance provides the following direction for the District Council in considering a request for the PD Zone (§ 59-C-7.14(b)):

The District Council must determine whether the density category applied for is appropriate, taking into consideration and being guided by the general plan, the area master or Sector Plan, the capital improvements program, the purposes of the planned development zone, the requirement to provide [MPDUs], and such other information as may be relevant.

The Zoning Ordinance classifies the density category applied for, PD-44, as a high-density planned development zone, which may be appropriate in an urban area. It is, moreover, the density recommended for the subject site in the Sector Plan. For reasons discussed above with regard to compatibility, while the zoning category may be appropriate, the combination of large buildings proposed for the site would not be compatible with the surrounding area.

Section 59-C-7.15, Compatibility. This section requires that a proposed development be compatible internally and with adjacent uses. It also establishes minimum parameters for setbacks and building height that are designed to promote compatibility. As discussed in Parts III.F. and V.A.(b)(1) above, the Hearing Examiner finds that the proposed development would not be

compatible internally or with existing development in the surrounding area. The specific setback and building height provisions are detailed below.

Section 59-C-7.15(b) reads as follows:

(b) In order to assist in accomplishing compatibility for sites that are not within, or in close proximity to a central business district or transit station development area, the following requirements apply where a planned development zone adjoins land for which the area master plan recommends a one-family detached zone:

(1) No building other than a one-family detached residence can be constructed within 100 feet of such adjoining land; and

(2) No building can be constructed to a height greater than its distance from such adjoining land.

The subject site is in close proximity to a CBD, and does not adjoin any property recommended for a one-family detached zone in the Sector Plan. Thus, the above limitations do not apply to this application.

Opposition counsel argues that the parameters cited in this section should be used as a guide to compatibility, since the subject site abuts land that is currently zoned and used for residential purposes. See Ex. 359(a) at 17. In the Hearing Examiner's view, these parameters apply to properties that are not in close proximity to a CBD because the expectation of privacy and open space must reasonably be lower in close proximity to a CBD. Thus, the full 100-foot setback and one-foot-per-foot-of-height limitations are not necessarily a fair guide to compatibility in this setting. Moreover, the appropriate setbacks depend in large part on the size of the building; lower buildings might be compatible without a full 100-foot setback. Most importantly, a finding of inconsistency with this element of the PD Zone is not necessary to make a decision in this case, given that ample other grounds are available to support the recommendation of denial.

Section 59-C-7.16, Green Area. The PD-44 Zone requires a minimum of 50 percent green area. The Development Plan depicts green area satisfying this requirement, consisting of landscaped areas in front of the buildings, between the proposed residential building and the church, and along the site perimeters; the interior courtyard/playground; and rooftop recreation areas. Applicants have

demonstrated that the ground-level green area covers 41.5 percent of the site, fulfilling approximately 91.5 percent of the green area requirement, while the rooftop green area represents 15.5 percent of the site area, fulfilling the remaining 8.5 percent of the green area requirement. See Exs. 326(b), 360(a) at 11.

The Concerned Residents presented evidence designed to demonstrate that the gross tract area of the subject site is larger than represented by the Applicants, and therefore the required green area is larger than the area proposed. The Hearing Examiner is persuaded by the testimony of Applicants' surveyor, Mr. Dye, that the tract area calculation is correct.

Opposition counsel further argues, supported by the testimony of Kenneth Doggett, that rooftop green space should not be counted as green area for purposes of Section 59-C-7.16. Mr. Doggett testified that the PD Zone's green area requirement is its principle means of limiting development on a site, because the zone does not impose a building coverage limitation, setbacks or an FAR requirement. He opined, moreover, that green area should always be on the ground so as to benefit the entire community, and to ensure a harmonious relationship among buildings on the site. Mr. Brown emphasized that the definition of "green area" in the Zoning Ordinance begins with "an area of land," which is inconsistent with the notion of putting green area on a building roof. He also interprets the green area definition to require that green area be generally available for use by occupants of all buildings on the site, and contribute to a sense of openness for residents and neighbors. See Ex. 359(a) at 21-23.

The Applicants argue, and Technical Staff agrees, that all of the green area proposed in this case should qualify, including the rooftop recreation areas and the day care center playground. Applicants' counsel note that the Council, the Planning Board and Technical Staff have previously decided that green area can include green space on rooftops, and that this proposal does not begin to approach the hypothetical of 100 percent green area on a roof. See Ex. 360(a) at 11.

The Zoning Ordinance defines "green area" as follows:

Green area: An area of land associated with and located on the same tract of land as a major building or group of buildings, or a prescribed

portion of the land area encompassed by a development plan, diagrammatic plan or site plan, to which it provides light and air, or scenic, recreational or similar amenities. This space must generally be available for entry and use by the occupants of the building or area involved, but may include a limited proportion of space so located and treated as to enhance the amenity of the development by providing landscaping features or screening for the benefit of the occupants or those in neighboring areas, or a general appearance of openness. Green area may include but is not limited to lawns, decorative plantings, sidewalks and walkways, active and passive recreational areas including children's playgrounds, public plazas, fountains, swimming pools, wooded areas, and watercourses. Green area does not include parking lots or vehicular surfaces, accessory buildings other than swimming pools, or areas of open space so located, small, or circumscribed by buildings, parking or drainage areas as to have no substantial value for the purposes stated in this paragraph.

The Planning Board and its staff interpret this definition to include areas on rooftops. The Hearing Examiner takes official notice of the District Council's decisions in local map amendment case G-861, decided in November 2008, and development plan amendment case DPA 06-1, decided in April, 2007, each of which provided for a significant percentage of green area on a rooftop.

The Hearing Examiner looks to legislative history to assist in determining the intent behind the green area definition. The definition has not been materially changed since its adoption in 1962. It was originally adopted in conjunction with creating a new zone for apartment buildings. See Ordinance No. 4-124, Feb. 13, 1962. The new zone was created in response to conditions at a number of apartment projects in the County, where "[p]oor site development and massive buildings with inadequate setbacks and distances between buildings have resulted in unnecessary destruction of topographic features, restricted light, traffic congestion, inadequate interior roadways of great problem to emergency vehicles and fire departments . . . and inadequate yard areas for recreation for apartment tenants." See *id.* The Ordinance Opinion made the following observations with regard to the need for more green area:

Particularly important has been the lack of recreational ground area. Even where "green areas" were theoretically available by a paper analysis of building lot coverage in relation to recreation area and parking area, such "green areas" have so [sic] been sliced up and divided into small strips, spots and dots that they were unusable for the benefit and enjoyment of the apartment dwellers.

This zone, by requiring site review, a percentage of “green area”, as well as a maximum allowable percentage of building coverage, remedies these deficiencies to provide a safe, healthful environment for apartment dwellers.

This language suggests that in adopting the green area definition, the Council was attempting to solve a problem – inadequate outdoor recreational space for apartment dwellers. The references to “inadequate yard areas for recreation” and a lack of “recreational ground area” could be seen, particularly in combination with the phrase, “An area of land” at the beginning of the green area definition, to suggest that green area was intended to be on the ground. It appears that the Council assumed that green area would be on the ground, which was not surprising in the Montgomery County of 1962, where space was not yet tight enough for anyone to think of putting recreation areas on rooftops. It is not clear, however, that the Council intended to prohibit green area from being located on a roof. The fundamental intent of the definition and the green area requirement was to provide useful outdoor recreation space for apartment dwellers, and that goal can be satisfied with a well-designed rooftop recreation area as well as on the ground.

The green area definition is rife with ambiguities, and should be updated and clarified. The Planning Board has long been the agency charged with determining how terms such as “green area,” “open space” and “public use space” will be applied. According to the Planning Board’s interpretation, which the District Council has accepted in at least one rezoning case and one development plan amendment, the entire green area requirement or any portion of it could be satisfied on a rooftop, if the Planning Board and its Staff consider it appropriate in a given case. In the Hearing Examiner’s view, if the County is to continue permitting green area to be located on rooftops, the phrase “An area of land” should be removed from the definition, and the language should specify parameters for how much of the green area requirement may be satisfied on a rooftop. The question of how much open land is required on the ground in urban zones and how much is acceptable on a rooftop deserves the considered attention of the Council, rather than a case-by-case determination.

The Hearing Examiner finds sufficient support in the legislative history to conclude that permitting green area on top of a roof is consistent with the fundamental intent of the green area

definition. Moreover, this interpretation has been applied consistently by the Planning Board, and the District Council accepted it in two recent matters. Nevertheless, I implore the District Council to revise and update the definition to reflect its intent more clearly.

It is a closer question, in the Hearing Examiner's view, whether open space that is not available to all site occupants equally should be considered green area for purposes of Section 59-C-7.16. Clearly the rooftop green area proposed here would not be available on an unlimited basis to those participating in church or community center activities, and the day care center playground would be available to condominium residents only on a very limited basis, despite the broad language of textual binding element number 8. In the Hearing Examiner's view, the arrangement proposed here should qualify as green area, because each of the main occupant groups would have unlimited use of some portion of the green area, and all would have some use of each of the green areas.

Section 59-C-7.17, Dedication of Land for Public Use. This section requires that land necessary for public streets, parks, schools and other public uses must be dedicated to public use, with such dedications shown on all required development plans and site plans. The Development Plan shows the proposed dedications along Old Georgetown and Glenbrook Roads.

Section 59-C-7.18, Parking Facilities. Off-street parking must be provided in accordance with the requirements of Article 59-E of the Zoning Ordinance. As discussed in Part III.G, the Development Plan provides for more than the required number of spaces for the residential use, the church and the child day care center, and the Hearing Examiner is persuaded that any potential operational conflicts among the various users would be resolved over time, if the application were approved.

The final two elements of finding (b), the maximum safety, convenience and amenity of the residents, and compatibility, have already been addressed.

(c) *That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.*

For the reasons discussed in Part III.G. above, the Hearing Examiner concludes that the evidence supports a finding that the proposed internal vehicular and pedestrian circulation systems and points of external access would be safe, adequate, and efficient.

- (d) That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.**

As discussed in Part III.H, no evidence was presented concerning whether grading would be minimized, but because the site is already mostly covered with buildings and pavement, and already sits on a terrace several feet above street level, it appears that significant grading would be unnecessary. The Development Plan calls for removing all of the specimen trees on the site, which is difficult to reconcile with a finding that it would tend to preserve natural features of the site. The evidence indicates that the decision to remove all of the trees was made at least in part based on an expectation that they would not flourish in a high-density environment. Having concluded that the proposed development would be too dense for the site and the neighborhood, the Hearing Examiner cannot accept this high density as a justification to take down all of the trees on the site. As one of the neighbors suggested, reducing the size of the buildings might allow the Applicants to preserve some of the large trees, which would be consistent with the purpose clause and the finding required in this section, and would improve buffering.

Uncontroverted evidenced demonstrates that water resource protection requirements would be satisfied in this case. Based on the removal of all trees to supported the requested density, the Hearing Examiner concludes that the evidence does not support an affirmative finding under this section.

- (e) That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.**

The Applicant has not provided any draft documents of this nature. However, a representative of Bozzuto testified that Bozzuto's affiliate and the church plan to enter into an agreement for shared use of the entire property, including maintenance of quasi-public areas. See Tr. June 24 at 34-35. Reverend Tollefson also acknowledged the church's intention to enter into such an agreement. See *id.* at 55-56.

B. Public Interest

The applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that all zoning power must be exercised:

“ . . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.” [*Regional District Act*, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities or the environment.

The Planning Board and Technical Staff concluded that the proposed development would substantially comply with the recommendations and objectives of the Bethesda CBD Sector Plan. For the reasons stated in Part III.F and Part V, the Hearing Examiner disagrees, finding that the proposed rezoning and development would be inconsistent with the recommendations of the Sector Plan and therefore with the public interest.

For the reasons stated in Part III.G., the Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed development would have no meaningful adverse effects on traffic conditions. The evidence indicates that utilities are readily available, and that forest conservation and stormwater management regulations would be satisfied, although other provisions

pertaining to the preservation of trees would not be satisfied. With regard to public schools, for the reasons stated in Part III.G. above, the Hearing Examiner finds that the expected minor addition to overcrowding at Bethesda Elementary School does not warrant denial of the requested rezoning.

The many supporters of this project contend that the rezoning should be granted in the name of public interest, to allow the church to continue and expand its services to the Bethesda community. While the evidence is uncontroverted that the church has provided beneficial services to the community for many years, the Hearing Examiner cannot in good conscience consider a development that would be seriously incompatible with its surroundings and with the applicable master plan to be consistent with the public interest. Moreover, as noted in Part III.F, the evidence suggests that many of the church's goals could be met with a development on a smaller scale.

Having carefully weighed the totality of the evidence, the Hearing Examiner concludes that approval of the present application in its current form would not be in the public interest.

VI. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, I reach the conclusions specified below.

A. Development Plan

1. The submitted Development Plan is not in substantial compliance with the Sector Plan.
2. The Development Plan does not fully comply with the purposes, standards and regulations of the PD-44 Zone and does not provide for a form of development that will be compatible with adjacent development.
3. The Development Plan proposes internal vehicular and pedestrian circulation systems and points of external access that will be safe, adequate and efficient.
4. The proposed development will not preserve any of the specimen trees on the site, which are the only notable natural features, although the technical forest conservation requirements

under Chapter 22A will be met. The preponderance of the evidence supports a finding that requirements for water resource protection under Chapter 19 will be satisfied.

5. No documents have been submitted to show the ownership and method of perpetual maintenance of areas intended to be used for recreational or other common or quasi-public purposes, but the binding testimony of the Applicants' representatives establishes that if the project goes forward, a shared use agreement among the property owners will ensure perpetual maintenance of common areas.

B. Zoning Request

Application of the PD-44 Zone at the proposed location is not proper for the comprehensive and systematic development of the County because the proposed development, as shown on the submitted Development Plan:

1. Will not serve the public interest;
2. Will not be in substantial compliance with the applicable master plan; and
3. Will not fully satisfy the purposes, standards and regulations of the zone.

VII. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-864, requesting reclassification from the R-60 Zone to the PD-44 Zone of 1.87 acres of land located at 8011 and 8015 Old Georgetown Road, Bethesda, Maryland, in the 7th Election District, be ***denied***.

Dated: December 15, 2008

Respectfully submitted,

Françoise M. Carrier
Hearing Examiner